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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 19, Original.

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Defendants*.

BRIEF OF COMPLAINANT IN OPPOSITION TO MOTIONS TO DISMISS THE BILL OF COMPLAINT.

STATEMENT OF THE CASE.

The case comes before the Court upon a motion by defendant Wilbur and a joint motion by the defendant States (all made on January 12, 1931) to dismiss the bill of complaint, filed herein on October 13, 1930.

The bill alleges that defendant Wilbur is proceeding in violation of the laws of Arizona to build a

dam on the Colorado River at Black Canyon, half of which is to be in Arizona, to store all the waters of the Colorado River flowing in Arizona, to divert these waters from Arizona for consumptive use elsewhere, and to prevent the beneficial consumptive use in Arizona of any of the unappropriated water of the Colorado River now flowing in Arizona; that these acts are done under color of authority of the Boulder Canyon Project Act; that this Act purports to authorize the construction of the dam, the diversion of the water from Arizona and its perpetual use elsewhere.

The bill alleges that the Act also approves and attempts to enforce a so-called interstate compact, ratified by the defendant States but which Arizona has refused to ratify, apportioning the beneficial consumptive uses in perpetuity which may be made from the whole Colorado River System including that great part of the system which is in Arizona; and that the Act directs and requires defendant Wilbur to permit no use of the unappropriated water of the main stream of the Colorado River now flowing in Arizona and to be stored by the said dam and reservoir, except subject to the conditions and reservations contained in said Compact.

The bill further alleges that these acts threaten irreparable injury to Arizona, where there are existing projects licensed by the State to appropriate and put to immediate use great quantities of hitherto unappropriated water, by preventing all use of such water and making great areas of the State forever uninhabitable and unproductive. The bill prays for a decree declaring both Act and Compact unconstitutional and void, and enjoining the defendants from carrying out the provisions of either and from carry-

ing out the provisions of certain contracts for the delivery of water already made by defendant Wilbur.

The geography of the Colorado River and the location of the proposed dam and reservoir are shown on the map opposite page 92 of this brief. The facts relating to both are given in Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, and XXXI of the bill. The Colorado, where it flows within and upon the boundary of Arizona, is not a navigable river.

Arizona is an arid state, where irrigation is necessary for cultivation. The Colorado River System is its greatest natural resource. Of the 240,000 square miles in the drainage basin of that system 103,000 are in Arizona. The Colorado River, after entering Arizona, flows for 292 miles wholly therein. Then for 396 miles the boundary of Arizona is the middle of its channel.[1] Tributaries of the Colorado flow within Arizona for a combined length of 836 miles. The total flow of the system is 18,000,000 acre-feet annually, of which 9,000,000 are appropriated, diverted and consumed within Arizona and the six defendant States. The remaining 9,000,000 acre-feet flow in the main stream of the river in Arizona, and are subject to appropriation in Arizona under its laws but only, within Arizona, upon compliance therewith. There are 2,000,000 acres of land in Arizona not now irrigated, but susceptible of irrigation from the Colorado River. Actual projects have been formed in Arizona for the irrigation of 1,000,000 acres of this land, and permits to appropriate water therefor—4,500,000 acre-feet annually will be required—granted by the State. All of this land will remain

[1] Bill, 4; Arizona Constitution, Article I; California Constitution, Article XXI, Sec. 1; Act of May 5, 1866, Ch. 75, 14 Stat. 43.

waste without irrigation, and irrigation is financially impossible unless the necessary water may be appropriated—that is, put to use and thereby the right to its beneficial consumptive use in perpetuity acquired, subject only to the rights of prior appropriators. (Bill, 4-12.)

The Colorado River Compact—printed in full in the complaint, pages 50-58, and analyzed pages 32-34, *infra*—fixes the total annual appropriations which may be made from the whole Colorado River System and apportions this amount to two areas, called the Upper Basin and the Lower Basin. The Lower Basin includes Arizona and portions of Nevada and California; the Upper Basin, portions of the remaining defendant States. To each basin is apportioned the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water, which must satisfy all existing appropriations as well as all future appropriations. There are existing appropriations totalling 6,500,000 acre-feet annually in the Lower Basin and 2,500,000 acre-feet annually in the Upper Basin. The Upper Basin States agree not to deplete the flow of the main stream at Lee Ferry below 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series. The flow of the system in excess of 15,000,000 acre-feet annually is not apportioned. So far as the Lower Basin States are concerned, they may use, but not appropriate, this unapportioned water, if and when it is available for use, subject to any rights which may be recognized in Mexico, and subject to its apportionment after October 1, 1963. If the satisfaction of recognized Mexican rights reduces the unapportioned water below 1,000,000 acre-feet annually, the Lower

Basin may require the Upper Basin to deliver from its apportionment one-half such amount.

The Act approves this Compact upon its ratification by six of the seven States affected by it. Such ratification has taken place. Arizona has refused to ratify. (Act, Sec. 13; Bill, 19, 26-27.) The Act further provides that all use of the works authorized by it and all use and users of water stored by these works shall observe and be subject to and controlled by the Compact, and that all contracts shall so provide. (Sec. 8.) By Section 5 no person shall have the use or right of use for any purpose of stored water except upon contract made with defendant Wilbur.

The Act authorizes the construction of the largest dam and reservoir in the world at Black Canyon. At least half of the dam and the greater part of the reservoir are to be in Arizona. The dam will store, and defendant Wilbur proposes to store, the entire unappropriated flow of the main stream of the Colorado River. The Act also authorizes the construction of a great canal from the Colorado River to the Imperial Valley of California, and provides that all water delivered there shall be free of charge. The Act authorizes defendant Wilbur, and he has made contracts, to divert stored water from Arizona and sell it for consumption elsewhere. The contracts are for permanent service, subject to the Compact. One such contract calls for the delivery of 1,050,000 acre-feet annually to the water district comprising Los Angeles and its suburbs. The delivery and use of this amount of water will exhaust the beneficial consumptive uses in perpetuity apportioned to the Lower Basin. (Bill, 19, 20, 34, 35.)

The defendant also threatens in his water regula-

tions, in compliance with the Act, to permit no use in Arizona of any unappropriated water now flowing in the main stream of the Colorado within Arizona, all of which he proposes to store, unless the user will agree by contract that his use shall be subject to the Compact—which means that his right to continued beneficial use is terminable at any time, either by subsequent appropriations of apportioned water in the Upper Basin, or by recognized appropriations in Mexico, or, after 1963, by the apportionment of the unapportioned flow of the river system. (Bill, 34, 78.)

Water the use of which is subject to such restrictions cannot be put to beneficial use in Arizona. Land in Arizona is and must be irrigated in large projects, due to the cost of installing diversion dams, canals and distribution works. Such projects cannot be financed unless water may be appropriated and the right to its beneficial consumptive use in perpetuity acquired. Defendant Wilbur threatens to prevent such appropriation and, thereby, all beneficial use in Arizona of water from the main stream of the Colorado River, including the carrying out of the existing projects referred to. (Bill, 9, 10, 38, 39.)

The bill presents a case involving the threatened invasion of the *quasi*-sovereign rights of Arizona in water flowing within her boundaries, by the construction of the dam therein and the diversion for perpetual use elsewhere of water stored and flowing within Arizona, thereby, and by enforcing the Compact, preventing any beneficial use of such water in Arizona.

SUMMARY OF THE ARGUMENT.

This is not a suit against the United States, nor one involving sovereign or property rights of the United States. It is a suit to enjoin an officer of the United States from invading, under color of an unconstitutional enactment, *quasi*-sovereign rights of Arizona.

The bill presents a justiciable case within the jurisdiction of this Court. Arizona has a *quasi*-sovereign interest in all the water and land within its boundaries, which it may protect by suit in this Court. Defendant Wilbur threatens to invade that right and injure Arizona by constructing works within Arizona to dam and permanently divert water flowing in Arizona for use elsewhere, and, by these works and by enforcing the Colorado River Compact, to prevent any beneficial use of Colorado River water now flowing in Arizona and subject to appropriation there. There are existing projects to use great amounts of this water, the execution of which defendant Wilbur is preventing. His acts will cause great areas of Arizona which are susceptible of cultivation to remain forever unproductive and uninhabited.

The statute which authorizes these acts cannot be justified as an exercise of power under the commerce clause to improve navigation. The bill contains well pleaded allegations that the Colorado River is not navigable. The contention that the Court should take judicial notice that the river is navigable is not sound in law, and an analysis of the documents cited by defendant Wilbur shows that it is not sound in fact. Furthermore, the purpose and effect of the Act is not to improve navigation. The Court is not bound by

the recital of purposes in the Act, but may determine the purpose of the Act from its effect. The effect, both of the Compact approved by the Act and of the project authorized by it, is to take out of the river the last half of its natural flow which still remains therein. A river which is non-navigable through lack of water, as is the Colorado, cannot be made navigable by taking out more water.

The statute cannot be justified as an act to reclaim public land. No public land is shown to be reclaimable by water stored in the reservoir or diverted by the canal. No provision is made in the Act for the present reclamation of any public land, and the provisions of the Act and Compact make any future reclamation of public land well nigh impossible.

The Act cannot be sustained as a flood control measure. The prevention of floods is not a federal function save as an improvement of or protection to navigation. Such is not the purpose or effect of this Act. The contention that the purpose of the Act is to protect property of the United States from flood damage, if material, is not sustained by anything in the Act, the pleadings, or the Congressional reports cited by defendant Wilbur.

The Boulder Canyon Project Act is unconstitutional and void. The bill of complaint states a cause of action, in alleging an impending threat of infringement by defendant Wilbur, under authority of an unconstitutional enactment, of *quasi*-sovereign rights of Arizona in water flowing within its boundaries, which unless enjoined will cause irreparable injury to Arizona and its people and for which there is no adequate remedy at law.

The motions to dismiss the bill of complaint should be overruled.

ARGUMENT.

I.

THIS IS NOT A SUIT AGAINST THE UNITED STATES.

Both motions assign as a ground of dismissal that "the bill of complaint does not join the United States, which is an indispensable party to this suit." This ground is not argued or referred to in the brief of Utah and Wyoming nor in that of Colorado, New Mexico and Nevada, but defendant Wilbur argues it in his brief, which California has adopted as its own. (Wilbur Brief, 14-18; California Brief, 4.) Defendant Wilbur and the State of California are contending that this is, in substance and effect, a suit against the United States, and that, since the United States has not consented to be sued, and can not be sued without its consent, the bill must be dismissed.

But this is not a suit against the United States. It is a suit to enjoin an officer of the United States from executing and enforcing an unconstitutional enactment, which, if executed and enforced, will deprive the State of Arizona of its right as a *quasi*-sovereign to regulate and control the appropriation and use of water within the State, and of its right as a land-owner to appropriate such water for use on its own land, and will deprive other land-owners in Arizona of their right to make similar appropriations, and will thereby cause great and irreparable injury to the State and its inhabitants. (Bill, 20-40.)

If such a suit, or any suit to enjoin the enforcement of an unconstitutional act of Congress, is a suit against the United States, it can only be so upon the theory that, in such a case, the United States is guilty

of violating its own Constitution, which is both legally and logically impossible. Officers of the United States may violate its Constitution, but the United States itself is incapable of doing so. That a suit to enjoin such a violation is not a suit against the United States is well established by the decisions of this Court.

In *Philadelphia Co. v. Stimson*, 223 U. S. 605, the Secretary of War had established harbor lines which encroached upon land claimed by the complainant, and was threatening to prosecute the complainant if it proceeded with the construction of a wharf on the land in question, and the complainant sued to enjoin the threatened prosecution, claiming that its constitutional rights would be violated thereby. In the opinion of the Court, delivered by Mr. Justice Hughes, it was said (pp. 619-620):

> "* * * If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. * * *
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do

> the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

The same principle was applied in *United States v. Lee*, 106 U. S. 196, 204-222; *Belknap v. Schild*, 161 U. S. 10, 16-18; *Scranton v. Wheeler*, 179 U. S. 141, 152, 153; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 107-111; *Lane v. Watts*, 234 U. S. 525, 536-540; *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 151, 152; and *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228, 238; all of which were suits against officers of the United States, but were held not to be suits against the United States. See also *Little v. Barreme*, 2 Cranch, 170, 177-179; *Noble v. Union River Logging Ry. Co.*, 147 U. S. 165, 171, 172; and *William Cramp & Sons Ship & Engine Building Co. v. International Curtis Marine Turbine Co.*, 246 U. S. 28, 40.

Applying the same principle, this Court has repeatedly held that a suit to enjoin the enforcement of unconstitutional State legislation is not a suit against the State. A leading case on this subject is *Ex parte Young*, 209 U. S. 123, 149-161. In *Truax v. Raich*, 239 U. S. 33, which was a suit to enjoin the enforcement of a State statute, this Court, again speaking through Mr. Justice Hughes, said (p. 37):

> "As the bill is framed upon the theory that the act is unconstitutional, and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded

as one against the State. Whatever doubt existed in this class of cases was removed by the decision in *Ex parte Young*, 209 U. S. 123, 155, 161, which has repeatedly been followed. * * *"[1]

In *Public Service Co. v. Corboy*, 250 U. S. 153, 159, the doctrine of *Ex parte Young* was declared to be "elementary", and in *Looney v. Crane Co.*, 245 U. S. 178, 191, the Court said of a contention similar to that now made by defendant Wilbur that "the unsoundness of the contention has been so completely established that we need only refer to the leading authorities."

The cases cited in the Wilbur brief (pp. 14-17) are not in point. In *Morrison v. Work*, 266 U. S. 481, an Indian ward of the United States claimed to be one of the equitable owners of land, the legal title to which was in the United States, and prayed for an injunction to restrain the Secretary of the Interior from administering and disposing of the land in what the complainant said was an unl[illegible] manner. In *Minnesota v. Hitchcock*, 185 U. [illegible]; *Oregon v. Hitchcock*, 202 U. S. 60; *Kansas v. [illegible] States*, 204

[1] Other cases in point are *Osborn v. Bank of United States*, 9 Wheat. 738, 846-859; *Davis v. Gray*, 16 Wall. 203, 220, 221; *Board of Liquidation v. McComb*, 92 U. S. 531, 541; *Virginia Coupon Cases*, 114 U. S. 269, 295-297, 314-316; *Pennoyer v. McConnaughy*, 140 U. S. 1, 9-12; *In re Tyler*, 149 U. S. 164, 190, 191; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 389-392; *Scott v. Donald*, 165 U. S. 107, 112-114; *Smyth v. Ames*, 169 U. S. 466, 518, 519; *Prout v. Starr*, 188 U. S. 537, 542-544; *Gunter v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 283, 284; *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 559; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 159; *Western Union Tel. Co. v. Andrews*, 216 U. S. 165, 166; *Herndon v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135, 155; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 642-648; *Home Telephone & Tel. Co. v. Los Angeles*, 227 U. S. 278, 282-296; *Harrison v. St. Louis & San Francisco R. R. Co.*, 232 U. S. 318, 332; *Tanner v. Little*, 240 U. S. 369, 374, 375, 380; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506, 507; and *Louisville & Nashville R. R. Co. v. Greene*, 244 U. S. 522, 529-531.

U. S. 331; *Louisiana v. Garfield*, 211 U. S. 70; and *New Mexico v. Lane*, 243 U. S. 52, the complainant States were seeking to establish their title to land which they claimed had been granted to them by the United States, the sole question being whether the title had passed to the States or remained in the United States. These land cases have no bearing on the question raised here. This is not a controversy over land.

Defendant Wilbur attempts to bring this case within the doctrine of the land cases just referred to, by suggesting in his brief (pp. 14, 17) that the United States is here claiming the right, as a land-owner, to appropriate water of the Colorado River for use on its land, and that Arizona is seeking to prevent the exercise of that right. A sufficient answer to this suggestion is that it has no basis in the pleadings. It does not appear from the bill that the United States is claiming any such right, or that it is seeking to appropriate or use water for any such purpose, or that it has any land on which such water could be used. On the contrary, it appears from the bill (pp. 31, 32, 35) that such is not the purpose of the legislation or of the action here complained of.

In *International Postal Supply Co. v. Bruce*, 194 U. S. 601, the owner of a patent sought to restrain a postmaster from using in his post office cancelling and post-marking machines which the United States had hired for a term not yet expired, and had placed in the post office for the use of the postmaster, and which the complainant claimed were an infringement of his patent. In *Goldberg v. Daniels*, 231 U. S. 218, a mandamus was sought to compel the Secretary of the Navy to deliver a vessel owned by the United

States to one who, in response to advertisement, made the highest bid therefor, but the Court held that the Secretary's discretion was not ended by the receipt and opening of bids. In *Louisiana v. McAdoo*, 234 U. S. 627, a State which operated sugar plantations by its convict labor sought to restrain the Secretary of the Treasury from making what the State said was an illegal reduction in duties collected on Cuban sugar. In *Wells v. Roper*, 246 U. S. 335, an injunction was sought to restrain the Postmaster General from annulling a contract for automobile mail service, the Secretary's action being based upon the supposed authority of the contract itself, and being purely discretionary and within the scope of his duties. In all these cases, the courts were asked to interfere with officers of the United States in the performance of duties imposed upon them by statutes whose validity was not questioned. That is not the situation here.

North Dakota v. Chicago & Northwestern Ry. Co., 257 U. S. 485; *Texas v. Interstate Commerce Commission*, 258 U. S. 158; and *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, were suits to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission. The first two were brought originally in this Court, and the third was brought in a State court. All were dismissed, because not brought in a district court of the United States, as required by Sec. 208 of the Judicial Code, as amended by Act of October 22, 1913 (38 Stat. 219), and because not brought against the United States, as required by Sec. 211 of the Judicial Code. These sections are obviously inapplicable to this case.

Kansas v. Colorado, 185 U. S. 125, was a suit against a State. It was not held to be, nor did any-

one suggest that it was, a suit against the United States. It was held that the acts there complained of, though done by State officers, were the acts of the State, and that it was therefore proper to sue the State and not its officers, because in that case there was no claim that the officers were acting in excess of their authority or under an authority not validly conferred. That claim, not made at all in *Kansas v. Colorado*, is the very foundation of the present suit.

II.

THE BILL PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE JURISDICTION OF THIS COURT.

The second and third reasons urged for the dismissal of this bill on behalf of defendant Wilbur may be discussed together. They are as follows:

> "2. The proposed acts of the defendants will not invade any vested rights of the complainant or of any of its citizens. Consequently the bill of complaint fails to state a case for equitable relief.
>
> "3. In failing to allege any actual or threatened interference with any existing right of the complainant, the bill of complaint presents only abstract questions which may never arise in any justiciable case or controversy."

In lieu of these grounds, the six defendant States in their motion maintain that:

> "This Honorable Court is without jurisdiction of the subject matter of the bill of complaint, for the reason that the same does not present for

adjudication any case or controversy of which the Court can take judicial cognizance."

Three different points of view in respect of the rights which Arizona asserts and the threatened injury thereto are set forth in the three briefs filed by the defendants.

The Wilbur brief contends that the bill does not allege any threatened interference with "vested" or "existing" rights, and that consequently no case for equitable relief is made out. "Vested" or "existing" rights are apparently considered to be rights to divert and consume water arising from appropriations heretofore made. (Wilbur Brief, 18.) It is also alleged that no interference is shown, actual or threatened, with the right of Arizona or its people to make appropriations in the future from the unappropriated waters of the Colorado River. But the inference is plain that such rights are not "vested" or "existing" and are not entitled to the protection of a court of equity.

Colorado, Nevada and New Mexico contend that the rights asserted by Arizona are "political" rights, and that the issue presented is not one of which this Court can take judicial cognizance. (Colorado Brief, 11-12.)

Utah and Wyoming do not discuss any of these matters but merely assert that they are not necessary or proper parties to this litigation.

It is therefore necessary to state briefly the rights which Arizona asserts are threatened by the acts complained of. It will clarify this discussion to point out first what rights are not claimed to be threatened.

In order that there might be no confusion as to the meaning of the term "to appropriate water," as used

in the bill of complaint, it was defined therein as follows: (Bill, 8)

> "To 'appropriate' water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire, under said laws, a vested right to take and divert from the same source, and to use and consume, the same quantity of water annually forever, subject only to the rights of prior appropriators."

Used in this sense, the bill alleges (Bill, 7-8) that prior to June 25, 1929, there had been appropriated in Arizona 3,500,000 acre-feet of water from the Colorado River and its tributaries below Lee Ferry, of which 2,900,000 acre-feet had been appropriated from the Gila River.

Section 5 of the Act provides without exception that no person shall use or be entitled to use the stored waters except by contract with the Secretary and upon payment of charges prescribed by him. The Wilbur brief contends (p. 18) that Section 8 requires this to be read in conjunction with Article VIII of the Compact, and that when so read rights of appropriators acquired prior to the effective date of the Act and Compact are preserved. Whether this is the true meaning of the Act or not, it is not thought that at the present time the intervention of a court of equity is necessary to protect the exercise and enjoyment of these rights, and in the present bill there is no allegation that they are threatened. In so far, therefore, as the Wilbur brief seeks to show that there is no threat of interference with rights of

appropriators in Arizona whose appropriations were made prior to June 25, 1929, it deals with matters not alleged in the bill.

1. The Right of Arizona to Control the Appropriation and Use of Waters Within Its Boundaries, Including the Erection Therein of Storage and Diversion Works, and to Preserve Such Water and the Use Thereof for Its People, Are Rights Which the State May Protect by Suit in This Court.

Water is one of the essential elements necessary to sustain life. It is as fundamental as earth or air. The interest of the State in the preservation and control of these natural elements for the benefit of its people in the present and future arises from its sovereignty, and transcends any title or right of use which the State may have recognized in or secured to individuals within its jurisdiction. Such an interest exists in the States of this Union, and the standing of a State to protect that interest by suit in this Court has been repeatedly recognized.

> "* * * This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. * * *"
>
> (By Mr. Justice Holmes in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237.)

"It is the State of Kansas which invokes the action of this court, charging that through the action of Colorado a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the Eleventh Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. *Georgia v. Tennessee Copper Co.*, decided this day, *post*, p. 230."

(By Mr. Justice Brewer in *Kansas v. Colorado*, 206 U. S. 46, 99; see also the opinion of the Court in the same case overruling the motion to dismiss, 185 U. S. 125, 140-144.)

"* * * But it is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas v. Colorado*, 185 U. S. 125, 141, 143; S. C., 206 U. S. 46, 99; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 238. What it may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same name within. * * *"

(By Mr. Justice Holmes in *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355.)

"* * * The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the Acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. * * *"

(By Mr. Justice Holmes in *Missouri v. Holland*, 252 U. S. 416, 431.)

"The State undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the State to prevent waste and to economize its water resources. (Citing cases.) The only way the City could acquire the right to take the water of the Delaware River was by grant from the State or by authorized purchase or condemnation from one to whom the right had been granted by the State. (Citing authority.) The power to determine the conditions upon which waters may be so diverted is a legislative function. The State may grant or withhold the privilege as it sees fit. * * *"

(By Mr. Justice Butler in *Trenton v. New Jersey*, 262 U. S. 182, 185.)

"But we need not inquire curiously as to the rights of the State of New York derived from this compact, for, wholly aside from it, and regardless of the precise location of the boundary line, the right of the State to maintain such a suit as is stated in the bill is very clear. The

health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this Court under the provisions of the Constitution of the United States. * * *"

(By Mr. Justice Clarke in *New York v. New Jersey*, 256 U. S. 296, 301-302.)

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. (Citing cases.) As the bill was dismissed upon the merits it is not necessary to say more upon this preliminary question. Also the direct appeal to this Court is proper as the State complains of an infringement of its right in the highways and of its other reserved powers and the case as made involves the construction of the Constitution of the United States.

"* * * As the defendant is undertaking to assert exclusive control and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly dismissed. * * *"

(By Mr. Justice Holmes in *Colorado v. Toll*, 268 U. S. 228, 230-231.)

Recognizing the vital importance to the welfare and prosperity of the State of waters within its boundaries, Arizona has exercised its sovereign au-

thority over them by statutes which control the building of dams and the use and appropriation of water and forbid any of these acts without its consent. (Bill, 13-14.) Under these statutes and under similar statutes of the defendant States appropriations of water have been made from this river system. The total of such appropriations equals only one-half of its total average annual flow—9,000,000 acre-feet out of 18,000,000 acre-feet. (Bill, 7-8.) The remaining 9,000,000 acre-feet of the average annual flow is unappropriated and all of it flows within the boundaries of Arizona.

The object of the bill is to restrain an individual from doing acts which it is alleged he has no authority to do, and which derogate from the sovereign authority of Arizona over water flowing within its boundaries. This authority extends over all water so flowing, irrespective of whether and to what extent the State has recognized and permitted individual rights to be secured therein. The right of the State is independent of and behind the rights of individuals, and, as here asserted, it involves the control of unappropriated water flowing within its borders, its preservation for the use of its people and the prevention of its diversion and use elsewhere. There can be no question that a bill in equity is the proper remedy to protect this sovereign right of the State. *Kansas v. Colorado*, 206 U. S. 46; *Georgia v. Tennessee Copper Co., supra; Missouri v. Holland, supra; Wyoming v. Colorado*, 259 U. S. 419; *Colorado v. Toll, supra.*

The standing of Arizona to assert such rights of *quasi*-sovereignty in this Court is in no way diminished by the fact that the Colorado River flows within

or upon the borders of other States as well as Arizona. *Kansas v. Colorado, supra; Wyoming v. Colorado, supra; Bean v. Morris*, 221 U. S. 485. In the case last referred to this Court said through Mr. Justice Holmes, on page 486:

> "We know no reason to doubt, and we assume, that, subject to such rights as the lower State might be decided by this court to have, and to vested private rights, if any, protected by the Constitution, the State of Montana has full legislative power over Sage Creek while it flows within that State. *Kansas v. Colorado*, 206 U. S. 46, 93-95. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their common boundary line. * * *"

Nor is the standing of Arizona to assert its rights diminished by the fact that, after the river has flowed for 292 miles wholly within the State, it forms the boundary of the State for 396 miles, the dividing line being the middle of the stream. The authority of Arizona within its borders is still paramount, and its obligation to its people to preserve the waters within those borders for the welfare of the State is no less because, in part, the boundary is the middle of the river. Compare *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 700-701.

What has been said above shows clearly that the rights here asserted by Arizona are not political rights beyond the cognizance of this Court, as is asserted by Colorado, Nevada and New Mexico on page 12 of their joint brief.

Georgia v. Stanton, 6 Wall. 50, is an excellent illustration of the assertion of rights purely political. The State in 1867 brought an original bill to enjoin Secretary of War Stanton and Generals Grant and Pope from carrying out the Reconstruction Act. In describing the bill this Court through Mr. Justice Nelson said on page 76:

> "The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained.
>
> "This is the substance of the complaint, and of the relief prayed for. * * *"

This bill, the Court said, called for its judgment "upon political questions", and, upon rights "of a political character". This was clearly so. The interest of the State there involved was not an interest in the control and preservation of natural resources or in the health and welfare of its people, but was solely in the political organization of the State government.

In *Massachusetts v. Mellon*, 262 U. S. 447, also

cited (Colorado Brief, 12) the suit was to enjoin the enforcement of the Maternity Act. The Act provided for appropriations to be divided among such of the States as would accept and comply with the provisions of the Act for the purpose of reducing infant and maternal mortality. The State alleged an infringement of its reserved powers. This Court through Mr. Justice Sutherland said (p. 480):

> "Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject. But we do not rest here. * * *
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> * * * * * * * * *
>
> (p. 483)
>
> "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.
>
> * * * * * * * * *
>
> (p. 484)
>
> "It follows that in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. * * *"

Thus the Court clearly differentiated between the rights asserted by Massachusetts and those here asserted by Arizona. Arizona asserts rights of dominion over physical domain which are to be interfered with against her will. Massachusetts asserted merely rights in the machinery of government as such which, in no event, were to be affected without her consent. Such rights were obviously purely political in character.

The remaining cases cited by the three States—*New Jersey v. Sargent*, 269 U. S. 328; *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 162; *Muskrat v. United States*, 219 U. S. 346, 361; and *Stearns v. Wood*, 236 U. S. 75, 78—are not cases where the rights asserted were held to be political rights, but are all cases where mere abstract questions were presented to the Court and abstract declarations of law asked of it. No "cases" or "controversies" existed in which a right of the complainant was shown to be affected prejudicially by any act of the respondent done or threatened. These cases will be considered again in this brief (*infra*, 43) when the injury threatened to Arizona is discussed. They have no bearing upon the nature of the right here asserted. That right has been determined by many decisions of this Court to be an appropriate subject of judicial cognizance.

2. The Bill Alleges the Threat of Immediately Impending Injury to Arizona and Its People From Acts of Defendant Wilbur and Presents a Case to Which the Judicial Power Extends.

This bill does not present abstract questions for the determination of this court, but alleges that the

acts and announced purposes of defendant Wilbur constitute a threat of immediately impending injury to Arizona and its people of the most far reaching and disastrous nature, for which there is no remedy except the injunctive process of this Court.

(a). Defendant Wilbur Threatens to Invade the Quasi-Sovereign Rights of Arizona by Building a Dam Within Its Jurisdiction and Diverting and Using Water from Its Jurisdiction in Violation of Its Laws.

The dam, reservoir and power plant which defendant Wilbur is proceeding to construct are at Black Canyon, and will be partly within the territory of Arizona. Black Canyon is on the Colorado River where it forms the boundary between Arizona and Nevada. (Bill, 4.)

The dam will be 727 feet high above its foundations and will have a storage capacity of 29,500,000 acre-feet of water. (Bill, 33.) A large part of the water stored in this reservoir, if not the largest part, would be stored within the territory of Arizona. The Act also authorizes the construction of a canal to connect the Imperial Valley of California with the Colorado River at Laguna Dam or at some other diversion dam to be constructed.

All the water flowing in the main stream of the river (except such amount, if any, as enters it from the Williams River; see Bill, 5, 8), will be stored in the proposed reservoir for some period of time. The reservoir proposed is large enough to store the entire present flow of the river at Black Canyon for

more than two years.[1] Defendant Wilbur has announced his purpose and intention to sell the use of water stored in this reservoir to generate electrical energy, to sell the water itself for consumptive use, and even to sell water from the river before it reaches the dam. (Bill, 34, 36, 78, 79, 89.) He has already made a so-called contract to deliver 1,050,000 acre-feet of water annually to the Metropolitan Water District of Southern California. (Bill, 34, 35, 79, *et seq.*) He has also made contracts with California corporations, municipal and private, for the delivery of vast quantities of falling water at the dam site for use in generating electrical energy for California. (Bill, 36-37.) Water for the Imperial and Coachella Valleys in California is to be delivered free of charge. All contractees in other States receiving water or its use will acquire rights under their contracts, adverse to the people of Arizona, to the continued use of the water diverted from Arizona and delivered to them.

The laws of Arizona provide that it shall be unlawful to construct within its jurisdiction any dam without the approval of the State given through its engineer. (Bill, 14, 48-50.) They also assert the public interest in all water within the jurisdiction of the State and provide that any person intending to acquire the right to the beneficial use of any water shall first obtain the permission of the State through its water commissioner, in the manner prescribed, and that without such permission the applicant shall

[1] The bill (p. 7) alleges the total average flow of the Colorado River and its tributaries in the United States to be 18,000,000 acre-feet of water annually. Of this 2,900,000 acre-feet flows in the Gila and 2,500,000 is diverted, used and consumed above Lee Ferry. (Bill, 7, 8.) The remainder, 12,600,000 acre-feet, less any flow of the Williams River which reaches the main stream, will be the approximate average annual flow at Black Canyon.

take no steps towards the construction of works or the diversion of water. After obtaining this consent the applicant may proceed to construct works and put water to beneficial use and by so doing acquire under the laws of Arizona the right to take from the same source and use and consume the same quantity of water annually forever, subject only to the rights of prior appropriators. (Bill, 8, 13, 14, 43 *et seq.*)

Obvious and fundamental considerations of preserving and wisely administering the greatest resource of an arid State led to the enactment of these laws. They secure interests of the State in persons and property as vital as any which it has. If the bill stated no more than that acts of this defendant, done and threatened to be done in Arizona under a statute which was an unconstitutional interference with rights reserved to the State, invaded the sovereign rights of the State in the waters within its jurisdiction in contravention of its will manifested in statutes, it would be a reasonable and proper means of asserting the *quasi*-sovereign rights of the State. Such was the ground upon which this Court took jurisdiction in *Missouri v. Holland, supra*, page 20. There the injury presented was an invasion of the *quasi*-sovereign interest of the State in wild birds within its borders.

In *Colorado v. Toll, supra*, page 21, this Court also stated that the bill disclosed a cause of action when it alleged an interference by one without authority with the *quasi*-sovereign interest of the State in its highways. The interest of Arizona in the water of the Colorado River here alleged to be invaded without authority is far more vital than was the interest of Colorado in its highways within a National

Park. So also in *Marshall Dental Manufacturing Co. v. Iowa*, 226 U. S. 460, an invasion of the interest of Iowa in the condition of a lake within its territory by one attempting to drain it without authority, was sufficient without more, to present a case within the jurisdiction of this Court.

Plainly the courts of Arizona would have jurisdiction of a suit to enjoin a defendant within its borders who was proceeding to build a dam therein and to divert water therefrom in contravention of its laws. If that defendant sought to justify his action by an alleged law of the United States this Court would have jurisdiction of an appeal. *Marshall Dental Manufacturing Co. v. Iowa, supra;* compare *Colorado v. Toll, supra; Missouri v. Holland, supra.* Such a case would not present an abstract question but a present and immediate clash of interests—a defendant threatening to perform acts within the jurisdiction of Arizona forbidden by its laws, and Arizona seeking to prevent those acts. This is wholly different from *New Jersey v. Sargent, supra,* or *New York v. Illinois,* 274 U. S. 488, where, among other differences, there was no act done or threatened to be done within the complaining State and no invasion of its sovereignty. If in those cases the defendant had threatened to build a dam and works upon the territory of the complaining States in violation of their laws, it can not be doubted for a moment that a bill would have been a proper method of asserting the *quasi*-sovereign rights of the States. The present bill clearly presents a "case" or "controversy" of which this court has jurisdiction, even if the only injury considered is the building of a dam within and diversion and use of water flowing within the jurisdiction of Arizona.

(b), Defendant Wilbur also Threatens to Prevent Any Use in Arizona of Unappropriated Colorado River Water Now Flowing There, And, at the Same Time, to Deliver Such Water For Use in Other States Under Contracts, Adverse to Arizona, For Permanent Service.

But the injury to Arizona alleged to be threatened by the bill is even more serious than that just considered, for the defendant is also threatening to exclude the people of Arizona from any use of hitherto unappropriated Colorado River water by imposing upon them such terms and conditions as make its use impossible. These terms and conditions are also in violation of the will of Arizona manifested in statutes.

The Act in Section 5 provides that,

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

The contracts are to be made by the Secretary of the Interior, are to impose, except upon users in the Imperial and Coachella Valleys in California, such charges as he may determine, and are to provide that all use of water so permitted is subject to the Colorado River Compact. Section 8 (a) of the Act and the defendant's Water Regulations explicitly so require.[1]

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[1] The Water Regulations (Bill, 34, 79) provide:

> "No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All purchases of water shall be subject to all the terms and provisions of the Colorado River Compact and of the Boulder Canyon Project Act."

See also the Power Regulations, Bill, 96, 109-110.

The Compact in Article II (a) defines the "Colorado River System" as "that portion of the Colorado River *and its tributaries* within the United States of America." It defines the "Lower Basin" so as to include practically all of Arizona. (Bill, 52, 4, 5, 6.) In Article III (a) there is "apportioned *from the Colorado River System* in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

The Wilbur brief on pages 9 and 19 totally misconceives and misstates the meaning and effect of the Compact, as is shown by pages 40 and 41 of the Colorado brief. The apportionment of beneficial use of water to the two basins made in Article III of the Compact is not, as the Wilbur brief appears to believe, restricted to uses from the main stream of the Colorado River, but includes, as the Compact specifically states and as the Colorado brief affirms, uses from the whole "Colorado River System" which by definition includes its tributaries. The apportionment to the Lower Basin from the whole river system is by Article III (a) the beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water, which includes all water necessary for the supply of all rights which exist in the Lower Basin upon the whole river system.

The provision in paragraph (d) of Article III that the Upper Basin States will not cause the flow of the river to be depleted below 75,000,000 acre-feet over ten year periods, has, as the Colorado brief, page 41, correctly states, no bearing on the amount of the ap-

portionment to the Lower Basin. This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt.

Under the Compact, then, the only water of which the right to exclusive beneficial use in perpetuity may be acquired in the Lower Basin is the water apportioned to that basin. Such apportionment is limited to 7,500,000 acre-feet of water per annum by Article III (a). The Colorado brief, page 40, contends that paragraph (b) of Article III operates to increase this apportionment to 8,500,000 for the Lower Basin. This, we submit, is not the case. If it had been intended to apportion

the larger amount, the Compact could easily have said so. The difference in language between paragraphs (a) and (b) is plain, and the difference in meaning is clear. Paragraph (b) does not *apportion in perpetuity*, as does paragraph (a), any beneficial use of water. It is very careful not to do this. It is to be read with paragraph (c) and relates solely to the method of sharing between the basins any future Mexican burden which this Government might recognize. This burden is to be satisfied first out of "surplus" waters, and surplus waters are defined, not as surplus over quantities "apportioned", but as surplus over quantities "*specified* in paragraphs (a) and (b)." Any deficiency remaining is to be borne equally by the two basins. Thus the Lower Basin, which without paragraph (b) might use water in excess of its apportionment without acquiring any exclusive right in perpetuity thereto, is enabled to retain such uses to the extent of 1,000,000 acre-feet per annum against the first incidence of the Mexican burden. Thereafter it is entitled to require the Upper Basin to share from its apportionment equally in the satisfaction of any deficiency. In other words, all that paragraphs (b) and (c) accomplish is to require the Upper Basin to reduce its apportionment in favor of Mexico before the Lower Basin is required to do so, the Lower Basin being entitled to contribute first, to the extent of 1,000,000 acre-feet, water which it may have used but to which it has no exclusive right in perpetuity—that is, water not apportioned to it. The water apportioned is that to which exclusive beneficial use in perpetuity is given in paragraph (a), less any deductions which may have to be recognized as provided in paragraphs (b) and (c).

For the purposes of the present case it makes little difference whether the apportionment to the Lower Basin is 7,500,000 or 8,500,000 acre-feet per annum. The present appropriations of 6,500,000 acre-feet and the threatened delivery of 1,050,000 acre-feet to Los Angeles will exhaust the former, and out of the latter leave only 950,000 acre-feet for the three Lower Basin States. There are immediate needs in Arizona alone of 4,500,000 acre-feet. (Bill, 11-12.) The bill alleges the existence of actual projects to irrigate 1,000,000 acres of land in Arizona not now irrigated but susceptible of irrigation from the Colorado River. This will require the appropriation of 4,500,000 acre-feet of water annually. (Bill, 11-12.) Permits to appropriate this water have been granted by the State.

A mere license to use water subject to subsequent appropriation in or apportionment to other States is of no value in Arizona. In California, where the Secretary will build the diversion dam and canal and furnish the water without charge, it may have value. But in Arizona (Bill, 10), because of the expense of constructing and operating diversion dams, canals and other works necessary for irrigation, irrigable tracts must be combined into large projects operated and administered as a unit and requiring financing on a large scale. This financing is impossible unless water can be appropriated and the right to its beneficial use in perpetuity acquired. Without this right there is no security whatever for the financing.

The vital difference between the appropriation of water under the laws of Arizona and the mere license permitted by the Compact to use water not apportioned to the Lower Basin, seems to have escaped the writer of the Wilbur brief. He says, on page 19:

"If Arizona's contentions are correct, the entire unappropriated flow of the stream is now and will continue until appropriation by others to be subject to appropriation by her citizens without regard to the terms of the Compact to which she is not a party. Until the dam has been built and the right of the State of Arizona or her citizens to make appropriations adequate to her existing needs has been invaded, or is presently threatened, there can be no basis for relief."

The very purpose and effect of the Act and the defendant's water regulations and contract is to prevent the citizens of Arizona from appropriating—*i. e.*, acquiring the right in perpetuity to exclusive beneficial use of—any part of the unappropriated flow of the stream, and to force them to accept from the defendant Wilbur a mere license subject to the terms of the Compact. To say, as do the defendant States (Colorado Brief, 29; Utah Brief, 7-9), that Arizona is not bound by the Compact is a mere sophistry and a most disingenuous one. For it appears that these States wrote the provisions of the Act here shown to be so harmful to Arizona for the very purpose of subjecting her citizens to the Compact. These provisions first appeared in H. R. 9826, 69th Congress. In reporting that bill the House Committee on Irrigation and Reclamation said (House Report 1657, 69th Cong., 2d Sess., p. 10):

"Perhaps half the time of the committee has been occupied in the consideration of this compact, and the bearing of the situation adverted to upon the project.

"Finally there emerged from the extended discussion a plan, which is expressed in the bill, for handling the interstate water-supply situation.

This provides that nothing shall be done under the bill until at least the six-State ratification becomes effective. *Various devices are in the bill to supplement the six-State ratification and protect the upper-basin States, these devices having been worked out and presented by representatives of these States.* The bill gives the essential congressional approval of the compact upon either a six or seven State basis. As has been well said, the bill 'enthrones the Colorado River compact'.

"This arrangement or plan is objected to by certain groups in the State of Arizona, but the committee has felt that in view of the somewhat uncertain conditions in that State and in view of the urgent necessity for flood relief in the lower Colorado, development should not be allowed to further await action by Arizona. The bill places no burden on Arizona that is not placed on each of the other States. Arizona is not required to approve the compact. She can make every use of the river and of the works provided in this bill that any other State can make and under exactly the same requirements as is made on the other States, *namely, the use must be made subject to the terms of the compact.*

* * * * * * * *

"* * * By 'enthroning the Colorado River compact', it assures to the States of Colorado and New Mexico, Utah and Wyoming the water rights so essential to their future." (Italics ours.)

Even without this frank statement it is plain from the Act itself that its purpose and effect is "to enthrone the Compact" and force Arizona and its people, as a condition to any use of the unappropriated flow of the stream, to forego the right to its continued use in perpetuity granted by the laws of

Arizona, and surrender its use to subsequent appropriators in the Upper Basin, in Mexico, or upon a further apportionment made in the future.

From what has been said it is apparent that those provisions of Section 4 (a) of the Act under which California is required to limit its aggregate annual consumptive use of water from the river to 4,400,000 acre-feet of water apportioned to the Lower Basin by Article III (a) plus not more than one-half of surplus waters unapportioned by the Compact, does not lessen the injury threatened to Arizona. All existing uses must be satisfied from the 7,500,000 acre-feet of water apportioned by Article III (a). Arizona has existing uses totalling 3,500,000 acre-feet. An agreement by California to take no more than the entire remaining apportionment can hardly be of value to Arizona. Similarly, since, as we have shown, unapportioned water, or water apportioned to the Upper Basin, can not be put to use in Arizona subject to the Compact, it is of no value that California also agrees to take no more than half of the surplus waters unapportioned by the Compact. These provisions have no effect or tendency to prevent or lessen the injury to Arizona.

(c). It is Not Necessary That the Bill Should Deny Title in the United States to Any Land Necessary for Appropriation of Unappropriated Water In Arizona.

The Wilbur brief contends that the bill does not show the complainant to be entitled to equitable relief because it does not allege that the projects men-

tioned can, apart from the acts of this defendant, be carried out without the use of land belonging to the United States or within the jurisdiction of another State, and that in the absence of such allegations there is no showing that Arizona or its permittees could take any water and so are injured by the threatened acts of the defendant. (Wilbur Brief, 10, 21, 25.)

There are two conclusive answers to such an argument. *First:* The contention is wholly immaterial to the cause of action alleged. *Second:* As a matter of pleading it is not necessary for the complainant in its bill to anticipate and deny matters which the defendant must raise as defenses to the bill.

First: The contention is immaterial. The cause of action alleged is not merely the prevention of appropriations in Arizona without more. It is that the defendant while preventing appropriations in Arizona is diverting water to users outside the State and enabling them to acquire rights adverse to Arizona in water now flowing therein. If the defendant were merely preserving the *status quo*, however unlawfully, he might possibly argue that to show injury Arizona must show power in itself to disturb it. But he is not doing this; he himself is disturbing it. It is immaterial whether Arizona or its permittees could build a reservoir without the consent of the United States. He himself is building one. He is making unappropriated water available for use. He is doing this in Arizona where it is now needed and can be used. He is threatening to divert large quantities for use in California to which users in California will acquire rights adverse to Arizona under contracts with the defendant. He is refusing to release any water

for users in Arizona unless they agree to surrender their right to continued use upon the demand of future users in the Upper Basin and in Mexico, if and when the rights in the latter are recognized. Water cannot be put to use in Arizona under such conditions.

The result of his acts and threatened acts will be to take forever from Arizona and its people all interest and control of water now flowing in Arizona for which there is present need in the form of organized projects approved by the State. It is not open to such an intruder unlawfully interfering with the river to urge that Arizona has not shown that it could appropriate the water without securing the consent of the United States to use its lands.

In *Marshall Dental Manufacturing Co. v. Iowa, supra,* this Court, affirming a decree granting an injunction against the draining of a lake in Iowa, said (p. 461):

> "* * * It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the State.
>
> "The question as to the title to the bed is treated as open in *Hardin v. Shedd,* 190 U. S. 508, 519, and *Whitaker v. McBride,* 197 U. S. 510, 515, and there is no need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the State owns the bed or not. This principle has been affirmed and acted upon by the court so recently that it does not require further argument here. (Citing cases.)"

In *Archer v. Greenville Sand and Gravel Co.,* 233 U. S. 60, the defendant without authority was dredging

gravel from the bed of the Mississippi where it belonged to the plaintiff. The Court said (p. 69):

> "Plaintiff owning the land to the middle of the stream, it would seem to follow that she must have such property in its soil as to resist a trespasser upon it, such as the bill alleges the Gravel Company to be. The right, however, is denied, and it is said that she is powerless to prevent the Gravel Company from dredging in front of her land because under the laws of the United States she herself could not do so without permission from the Secretary of War. (Citing the statute.) * * * Whether if she took gravel from the front of her land she would incur the condemnation of this act it is not necessary to decide. She certainly had such an interest in the conditions to prevent one without right from disturbing them. * * *"

In both these cases the question was left open as immaterial whether the complainants could have enjoyed their property without the consent of the United States. The unauthorized acts were none the less an infringement of the complainants' interest in the condition of water or land and could be enjoined. In the present case Arizona has an equally clear and sufficient interest in the water within her territory, of which the defendant, an intruder, threatens to deprive her and her people. It is immaterial whether or not the consent of the United States to use land may be necessary for the enjoyment of the right.

Second: As a matter of pleading the Wilbur brief appears to assume that the sovereignty of Arizona over lands within its boundaries must be affirmatively pleaded to be established. This is the basis of the

argument that the bill is defective because it does *not* allege that the United States does *not* own the dam sites mentioned in paragraphs X and XI of the bill, and the banks of the river. But the contrary is true. The sovereignty of Arizona over these lands is established by the allegation that they are within its jurisdiction. Compare *Georgia v. Tennessee Copper Co., supra,* page 18. If the defendant believes that as to any of these lands there are any limitations upon that sovereignty, it is for him to allege and prove the exception.

The bill alleges that there are dam sites and reservoir sites on the river where it flows wholly in Arizona, which are suitable for the construction of storage dams and reservoirs (Bill, 10); that the projects for irrigation in Arizona (already discussed) contemplate the construction and use of dams at these sites. There is no inference here that any of these sites are on land belonging to the United States. The Wilbur brief blandly states that "where the stream flows through the State of Arizona it flows * * * in national parks and other reservations of the United States". This testimony, however, must be disregarded. There is nothing whatever in the bill which the defendant asks the Court to dismiss upon this ground to warrant such an argument.

The bill also alleges the existence of dam sites and reservoir sites upon the boundary between Nevada and Arizona. These, the Wilbur brief argues, could not be used without the consent of Nevada, "which presumably would not grant consent except in furtherance of the purposes of that Compact". What Nevada would have to gain by imposing the acceptance of the Compact upon Arizona as a condition

to the construction of a dam which could not injure but could only benefit Nevada, does not appear. It is merely presumed that this would be done. There is no basis for the argument whatever. It should be noted that the consent of Nevada to the building of a dam by Arizona is regarded as an essential prerequisite. But the consent of Arizona to the building within its territory of a dam is regarded as entirely unnecessary. The obvious inconsistency is sought to be avoided by the pretext of exercising powers delegated to the Federal Government. But President Coolidge understood and voiced the purely parochial purposes of the dam when he said to Congress:

> "The States which are interested ought to reach mutual agreement. This project (Boulder Dam) is in reality their work. If they wish the Federal Government to undertake it, they should not hesitate to make the necessary concessions to each other."
>
> (Message to Congress, December 6, 1927.)

(*d*). *The Cases Cited by Defendants Which Were Dismissed as Presenting Only Abstract Questions Have Nothing in Common With This Case.*

We have already pointed out (*supra*, 30) fundamental differences between *New York v. Illinois*, *supra*, and *New Jersey v. Sargent*, *supra*, and the present case. In those cases there was no existing clash of interests. The most that appeared from the bills was that if in the future it was desired to develop water power in those States, the acts of Illinois, in the first case, and the Act of Congress, in the second case,

might interfere with such development. And in neither case was the defendant charged with the commission of any act within the complainant State in derogation of its *quasi*-sovereign powers.

The other cases presenting abstract questions have no relevancy here. In *Massachusetts v. Mellon*, already discussed (*supra*, 24, 25), no act complained of could by the terms of the statute itself be performed in Massachusetts without the consent of that State. In *Muskrat v. United States*, *supra*, the very statute under which the suit was brought provided not for any decree or judgment but for a mere advisory opinion. In *Stearns v. Wood*, *supra*, the plaintiff had no interest whatever in the subject matter of the suit. In *Texas v. Interstate Commerce Commission*, *supra*, no law or interest of Texas was shown to be infringed by any act done or threatened to be done. In all of these cases there was no clash of interests, the settlement of which required the exercise of judicial power. The complainants were seeking only a declaration of abstract principle clothed with the authority and prestige of this Court.

There could hardly be a more immediate clash of interests than that presented by this bill, or one which more clearly stated a case or controversy within the cognizance of the judicial power. But it is contended that the prayer of the bill shows that a mere abstract declaration of law is its object, and this because it prays that Act and Compact be declared unconstitutional and void and the defendants enjoined from carrying out any of the provisions of either, or any of the three contracts made pursuant thereto. (Wilbur Brief, 21.) The short answer to this contention is the decree rendered by this Court in *Pennsyl-*

vania v. West Virginia, 262 U. S. 623, 624.[1] If further answer is needed it is that the purpose and effect of the Act is to build the dam in Arizona and "enthrone the Compact" in Arizona as well as in those States which have accepted it. Enough has been said of the immediate threat of injury to Arizona by the attempt to carry out these purposes. There are no other purposes in the statute, nor any lawful acts which can be performed thereunder.

III.

THE BOULDER CANYON PROJECT ACT CANNOT BE JUSTIFIED AS AN EXERCISE OF THE POWER TO REGULATE COMMERCE BY IMPROVING NAVIGATION.

The bill alleges (pp. 6, 7) that the Colorado River is not navigable anywhere within or on the boundaries of Arizona. Despite this allegation, defendant Wilbur and the States of California, Colorado, New Mexico and Nevada attempt to justify the Boulder Canyon Project Act as an exercise of the power to regulate commerce by improving navigation. (Wilbur Brief 2, 11, 13, 23, 26-34; California Brief, 4;

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[1] "These suits having been heretofore submitted on the pleadings and the evidence, and the Court being now fully advised in the premises,

"It is considered, ordered and decreed as follows:

"1. That the Act passed by the Legislature of the defendant State February 10, 1919, which is set forth in the bills of complaint in these suits and known as Chapter 71 of the West Virginia Acts of 1919, is a void and inoperative enactment because it contravenes the limitations which the Constitution of the United States places upon state action in respect of commerce among the several States;

"2. That the defendant State, and her several officers, agents and servants, are hereby severally enjoined from enforcing, or attempting to enforce, that Act;"

Colorado Brief, 7, 9, 10, 15-21.) Utah and Wyoming do not join in this attempt, but admit Arizona's allegation that the Colorado River is not navigable. (Utah Brief, 11.)

1. The Motions to Dismiss Admit Arizona's Allegation That the Colorado River is Not Navigable. This is An Allegation of Fact, Not a Conclusion of Law. If Insufficiently Pleaded, Non-Navigability is Presumed.

Aside from any admission contained in the briefs, the rule is that a demurrer or motion to dismiss admits every well pleaded allegation of fact contained in the bill. *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228, 232. It is also the rule that facts not appearing on the face of the bill cannot be considered in determining a demurrer or motion to dismiss. *Stewart v. Masterson*, 131 U. S. 151, 158.

In the face of these elementary rules of pleading, defendant Wilbur and the States of California, Colorado, New Mexico and Nevada are asking the Court to disregard Arizona's allegation that the Colorado River is not navigable, and to hold, without allegation or proof, that it is in fact a navigable river. They put this request upon the ground that the allegation of non-navigability is not an allegation of fact, but a mere conclusion of law. (Wilbur Brief, 27-29; California Brief, 4; Colorado Brief, 16-20.)

The Wilbur brief cites no authorities in support of this contention, and those cited in the Colorado brief (pp. 17, 18) do not in fact support it. No question of the sufficiency or insufficiency of an allegation of navigability or non-navigability was involved in

any of the cited cases.[1] Questions of navigability were involved in *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349; and *Economy Light & Power Co. v. United States*, 256 U. S. 113, but in each case the question was treated as a question of fact, and, without exception, it has been so treated whenever it has arisen in this Court.[2]

Counsel for Colorado, New Mexico and Nevada have also cited *Walker v. Allen*, 72 Ala. 456, wherein the court reversed a decree overruling demurrers to a bill brought to enjoin the construction of a boom across a stream in Alabama. But counsel apparently have failed to observe that the allegation there held insufficient was an allegation of navigability, not of non-navigability. The Alabama Court said (p. 458):

> "• • • All tidal streams are, prima facie, public and navigable; all streams above-tide-water, if in the survey of the public lands by the United States they have not been treated as navigable, fractional sections made upon their margin, and the bed reserved from grant or sale, are prima facie private—not navigable, and 'not subject to a public right of floatage upon them.' Upon the party claiming for such streams the

[1] No question of navigability or non-navigability was involved in *United States v. Des Moines Navigation & Ry. Co.*, 142 U. S. 510; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53; *Western Union Tel. Co. v. Inman & I. S. S. Co.*, 48 Fed. 85; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 651; *Hubbard v. Fort*, 186 Fed. 987; or *The Steam Dredge No. 6*, 222 Fed. 576.

[2] See, in addition to cases cited *supra*, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 696-699; *Leovy v. United States*, 177 U. S. 621, 627-635; *Donnelly v. United States*, 228 U. S. 708, 709; *Oklahoma v. Texas*, 258 U. S. 574, 586; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86; *United States v. Holt State Bank*, 270 U. S. 49, 56, 57.

character of public and navigable, rests the onus probandi, and the duty of stating the facts from which the court can draw the conclusion that the stream of water is of the character claimed for it."

It should be observed that, at all points within and on the boundaries of Arizona, the Colorado River is a non-tidal stream (Bill, 6), and therefore within the doctrine of the Alabama case. This doctrine is not peculiar to Alabama. Rivers not known to be navigable are generally presumed to be non-navigable, and whoever asserts their navigability has the burden of proof.[1]

It thus becomes unnecessary to consider whether in this case the non-navigability of the Colorado River has been sufficiently pleaded, since, if insufficiently pleaded, it will be presumed.

2. The Court Cannot Properly Take Judicial Notice that the Colorado River is Navigable.

It is further contended by defendant Wilbur and the States of California, Colorado, New Mexico and Nevada that this Court should take judicial notice that the Colorado River is navigable, and should for that reason disregard Arizona's allegation that it is not navigable. (Wilbur Brief, 2, 13, 29-34; California Brief, 4; Colorado Brief, 20.) The substance of their contention is that navigability and non-navigability are mere facts of geography, which every court is bound to know judicially, and as to which no issue can be raised, no evidence heard.

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[1] *Harrison v. Fite*, 148 Fed. 781, 785; *Minter v. North American Dredging Co.*, 242 Fed. 553, 559; *Lehy v. Ashland Lumbering Co.*, 49 Wis. 165, 169. Compare *Oklahoma v. Texas*, 256 U. S. 574, 589.

This contention is not sustained by the cases which have been cited for that purpose.[1] *The Montello*, 11 Wall. 411, cited at page 30 of the Wilbur brief, had to do with the Fox River between Oshkosh and Portage City, within the State of Wisconsin. There was no question as to the navigability of that part of the river. It was not only navigable, but was actually being navigated. The question was whether the water so navigated was a navigable water of the United States. This Court was unable to decide that question, because the record did not show, and the Court did not know, judicially or otherwise, whether the Fox River, by itself or by its connection with other waters, formed a highway over which interstate or foreign commerce was or might be carried on. In other words, the Court did not know and could not ascertain from the record how much of the Fox River was navigable, or which, if any, of its tributaries were navigable. The case was remanded for further proceedings, the Court stating (p. 415):

> "* * * the parties will be able to present, by new allegations and evidence, the precise character of Fox River as a navigable stream * * *"

That was done, and when the case came again before this Court (20 Wall. 430) it was decided upon

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[1] No question of navigability was involved in *The Planter*, 7 Pet. 324; *Brown v. Piper*, 91 U. S. 37; *Jones v. United States*, 137 U. S. 202; *Brown v. Spilman*, 155 U. S. 665; *United States v. Thornton*, 160 U. S. 654; *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.*, 174 U. S. 674; *Pearoy v. Stranahan*, 205 U. S. 257; *Muller v. Oregon*, 208 U. S. 412; *Cubbins v. Mississippi River Commission*, 241 U. S. 351; *Carroll v. United States*, 267 U. S. 132; *Middlesex Transportation Co. v. Pennsylvania R. R. Co.*, 82 N. J. Eq. 550; *Heiskell v. Knox County*, 132 Tenn. 180; or *McSween v. State Live Stock Board*, 97 Fla. 750.

the evidence. In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, cited at page 30 of the Wilbur brief, the opinion, delivered by Mr. Justice Brewer, was in part as follows (p. 697):

"* * * In *The Montello*, 11 Wall. 411-414, it was observed: 'We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States.' But the force of this general statement is qualified by the declaration at the close of the opinion: 'As the decree must be reversed and the cause remanded to the court below for further proceedings, the parties will be able to present, by new allegations and evidence, the precise character of Fox River as a navigable stream, and not leave the matter to be inferred by construction from an imperfect pleading.'

* * * * * * * *

"It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence, and to be determined by proof. That the Rio Grande, speaking generally, is a navigable river is clearly shown by the affidavits. It is also a matter of common knowledge, and therefore the courts may properly take judicial notice of that fact. But how many know how far up the stream navigability extends? Can it be said to be a matter of general knowledge, or

one that ought to be generally known? If not, it should be determined by evidence. * * *"

In *Economy Light & Power Co. v. United States*, 256 U. S. 113, cited at page 31 of the Wilbur brief, the United States sued to enjoin the construction of a dam in the Des Plaines River, alleging it to be a navigable water of the United States. The defendant denied that the river was navigable. On this question of navigability a large amount of evidence was taken, the abstract containing 3,186 printed pages. (256 Fed. 792, 793.) On this evidence the District Court, the Circuit Court of Appeals and this Court held the river to be navigable. No question of judicial notice was involved.

Instead of sustaining the contention in support of which they were cited, these cases establish the proposition that courts do not take judicial notice of the navigability of a stream, unless its navigability is a matter of common knowledge and free from doubt. Other cases enunciate the same doctrine. For example, in *Donnelly v. United States*, 228 U. S. 243, 708, the Court was asked to take judicial notice of the alleged navigability of the Klamath River at a point in California where a homicide had been committed. There was a California statute which, in effect, declared that the river was not navigable. Mr. Justice Pitney, who delivered the opinion, said (p. 709):

"* * * It is conceded that whether the Klamath is navigable at the place where the homicide occurred is a question of fact. Of course the tide ebbs and flows at the river's mouth, but the *locus in quo* is approximately twenty-five miles from

the mouth, and quite beyond any possible influence of the tide. As the opinion points out, there was evidence tending to show that the stream is navigable in fact at certain seasons from Requa (near its mouth) up to and above the *locus in quo*. But the evidence was by no means conclusive. It showed an apparently irregular traffic, in times of high water only, employing Indian canoes, 'dug-outs,' and at certain times small steamboats and gasoline launches. In this state of the evidence, the trial court could not, nor can we, take judicial notice of the stream as being navigable in fact; especially in the face of a declaration by the legislature of the State that it is not navigable. * * *"

A question of navigability was involved in *The Daniel Ball*, 10 Wall. 557, 561, but it was decided on the facts stipulated by the parties, not on facts judicially noticed. Similar questions were involved in *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 359; *Leovy v. United States*, 177 U. S. 621, 627, 635, 637; *Oklahoma v. Texas*, 258 U. S. 574, 590, 591; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86; and *United States v. Holt State Bank*, 270 U. S. 49, 56, 57, and in each case the question was decided on evidence. In none of these cases did the Court assume to know judicially that the stream in question was or was not navigable. Indeed we know of no instance and counsel for defendants have cited none, in which this Court has ever decided a disputed question of navigability by judicial knowledge or notice, unaided by evidence.

In *United States v. Utah*, 279 U. S. 816, still pending in this court (No. 14, Original, October Term,

1930), the sole question of fact was and is whether certain portions of the Colorado, Green and San Juan Rivers within the State of Utah are navigable, their non-navigability being alleged by the United States and denied by the State. Instead of taking judicial notice of the facts and deciding the case on that basis, the Court appointed a Special Master to take the evidence and report it to the Court, with his findings of fact, conclusions of law and recommendations for a decree. Pursuant to the Court's order, the Special Master held 31 public hearings, at which the parties and their counsel appeared and presented their evidence, consisting of 670 exhibits and the testimony of 171 witnesses, covering 5,536 typewritten pages, and reported it to the Court, with his findings of fact, conclusions of law and recommendations for a decree, on October 15, 1930. (Special Master's Report, pages 1-3.) Was this a vain and useless performance? If not, defendant Wilbur and the States of California, Colorado, New Mexico and Nevada must be wrong in their contention that the Court should now take judicial notice of the supposed navigability of the Colorado River.

The documents referred to in Appendix A of the Wilbur brief (pp. 39-46) are, properly speaking, not before the Court, but even if they were, they would not warrant a finding, nor would they enable the Court to know judicially, that the Colorado River is navigable. These and other documents on the same subject are discussed in the Appendix hereto (pp. 93-103).

3. The Court is Not Bound by the Declaration of Purposes Contained in the Act, But May Determine Its Real Purpose by Considering Its Effect.

Even if the Colorado River were conceded to be navigable, it would still be necessary to inquire whether improvement of navigation is the purpose of the Boulder Canyon Project Act. The Act contains a recital that improvement of navigation is one of its purposes (Bill, 58), but the bill alleges that this is a mere subterfuge and false pretense. (Bill, 31.)

Defendant Wilbur and the States of California, Colorado, New Mexico and Nevada are asking the Court to disregard this allegation and to accept without question the declaration of purposes contained in the Act. (Wilbur Brief, 33; California Brief, 4; Colorado Brief, 15, 16, 20, 21.) Defendant Wilbur and the State of California offer no reason for their suggestion that this allegation be disregarded, but Colorado, New Mexico and Nevada put their request upon the ground that Arizona is thereby attempting to question the "motives" of Congress. (Colorado Brief, 15, 20.)

Arizona is attempting no such thing. The allegation in question is aimed, not at the motives of Congress, but at the purpose and effect of the Act. The motives of Congress are nowhere mentioned or referred to. It is true, as said in *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 210 (Colorado Brief, 20), that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives, but it does not follow, nor is it true, that when Congress has exceeded the limits of its constitutional authority, it may avoid judicial inquiry

into the validity of its act by inserting therein a false declaration of purposes. State legislatures are likewise presumed to act with full knowledge and in good faith, as was held in *United States v. Des Moines Navigation & Ry. Co.*, 142 U. S. 510, 544, and *Atchison, Topeka & Santa Fe R. R. Co. v. Matthews*, 174 U. S. 96, 104 (Colorado Brief, 21), but this does not preclude an inquiry as to whether the declared purpose of legislation is its true purpose.

That this Court is not bound by such legislative declarations, but may determine the true purpose of legislation by considering its effect, is well settled. In *Hammer v. Dagenhart*, 247 U. S. 251, an act of Congress prohibiting transportation in interstate commerce of the products of child labor was held unconstitutional. The act purported to be (as the Boulder Canyon Project Act purports to be) a regulation of commerce, but the Court looked beyond the declared purpose of the act and, speaking through Mr. Justice Day, said (p. 271):

> "* * * The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. * * *"

(p. 272)

> "Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."

(p. 273-274)

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

In *Child Labor Tax Case*, 259 U. S. 20, the Child Labor Tax Law (incorporated in a revenue act) was held unconstitutional. The act imposed what purported to be a tax on the employment of child labor. This Court, however, looked beyond the declared purpose and, speaking through Chief Justice Taft, said (p. 39) that, in reality,

"* * * the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect to a matter completely the business of the State Government under the Federal Constitution. * * *"

As to the validity of the so-called tax, the Chief Justice said (p. 38):

"* * * Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon depar-

tures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

The same disastrous consequences must result from giving to the word "navigation" the magic which the defendants in this case are claiming for it.

In *Hill v. Wallace*, 259 U. S. 44, an act of Congress known as the Future Trading Act was held unconstitutional. The act imposed what purported to be a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery. This Court looked beyond the declared purpose of the act, and, again speaking through Chief Justice Taft, said (p. 66):

> "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. * * * The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. * * * The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. * * *"

In *Linder v. United States*, 268 U. S. 5, in reversing a conviction under the Narcotic Law, the Court, by Mr. Justice McReynolds, spoke of the necessity of construing the law so as to avoid grave

doubts as to its constitutionality, and pointed out (p. 17) that the declared object of the law was to provide revenue, and that its provisions must be interpreted and applied in the light of the principle that

> "* * * Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced. * * *"

This Court has applied the same principle to State legislation.

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases.*"
>
> (By Mr. Justice Miller in *Henderson v. Mayor of New York*, 92 U. S. 259, 268.)

> "A State cannot make a law designed to raise money to support paupers, to detect or pre-

vent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title."

(By Mr. Justice Miller in *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 63.)

"* * * The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

(By Mr. Justice Harlan in *Mugler v. Kansas*, 123 U. S. 623, 661.)

"The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. * * *"

(By Mr. Justice Harlan in *Minnesota v. Barber*, 136 U. S. 313, 319.)

"One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce. * * *"

(By Mr. Justice Butler in *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 10.)

We submit, therefore, that this Court is not bound by the declaration of purposes contained in the Boulder Canyon Project Act, but may determine its real purpose by considering its effect.

4. By This Act Congress Has Attempted to Exercise Control of the Colorado River and Its Tributaries, Not for the Improvement of Navigation, but for Other Purposes, the Accomplishment of Which Would, if the River Were Navigable, Destroy Its Navigability.

By this Act Congress has asserted and attempted to exercise supreme and exclusive control of the Colorado River and its tributaries in two ways: First, by approving and attempting to execute and enforce the Colorado River Compact, and second, by providing for the construction, maintenance and operation of a project consisting of a dam, reservoir, power plant, canal and other incidental works and structures. These two parts of the Act (the Compact part and the project part) constitute the whole of it. An examination of the Act will show that neither part of it has any purpose or tendency to improve navigation, but that if there were any navigation, and if it were at all affected by the Act, it would be affected adversely.

(a). *The Compact.*

The Compact, which the Act approves and attempts to enforce, deals with two kinds of water—that which has been appropriated and that which remains unappropriated. As to the first, the Compact provides in Article VIII (Bill, 56):

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact."

By approving and attempting to enforce the Compact, Congress has recognized and undertaken to protect these "present perfected rights." (Bill 70, 71, 74-76.) They are expressly recognized by Section 6 of the Act. (Bill, 68.) The rights thus recognized and protected are the rights of water users in the Upper and Lower Basins to divert and consume annually 9,000,000 acre-feet of water, which is one-half of the total average annual flow of the Colorado River System. (Bill, 7.) Of this 9,000,000 acre-feet of appropriated water the Upper Basin has appropriated and is using 2,500,000 acre-feet and the Lower Basin 6,500,000 acre-feet annually. (Bill, 7.)

By the diversion of this water and the creation of these "present perfected rights," the Colorado River, if it ever was navigable (which Arizona denies), has lost what little navigability it once possessed. The documents referred to in Appendix A of the Wilbur brief (pp. 39-46) and in the Appendix to this brief (pp. 93-103) show conclusively that even in the '60s and '70s of the last century, before any appreciable quantity of water had been diverted from the river, the one great and (even then) insuperable obstacle

to its navigation was lack of water. They further show that as diversions increased and present rights became perfected, even the slight (so-called) navigation which once existed on the river disappeared. That its disappearance was caused, in part at least, by the diversion and consumption of this 9,000,000 acre-feet of water cannot be doubted. Does the Act provide that the water thus lost to navigation shall be restored? On the contrary, by approving the Compact, it provides, in effect, that the loss shall be made perpetual.

As to water not yet appropriated, the Compact (which the Act approves and attempts to enforce) provides, in effect, that each Basin may increase its present consumptive use of water in perpetuity until each has reached a total of 7,500,000 acre-feet. (Bill, 52.) This means that the Upper Basin may add 5,000,000 acre-feet and the Lower Basin 1,000,000 acre-feet annually to present consumptive uses in perpetuity. (Bill, 7.) The Compact also provides that the Lower Basin may further increase its consumptive use of water (but not in perpetuity) by an additional 1,000,000 acre-feet annually. (Bill, 53.) Deducting these amounts from the total annual flow of 18,000,000 acre-feet (Bill 7), there remains 2,000,000 acre-feet of unapportioned water from which any rights accorded Mexico are to be satisfied. (Bill, 53). By the terms of the Compact, any part of this 2,000,000 acre-feet not required by Mexico shall (together with the 1,000,000 acre-feet temporarily awarded to the Lower Basin) be subject to apportionment between the two Basins in 1963, or at any time thereafter.

Thus the Compact and the Act clearly contem-

plate that eventually all the water of the Colorado River System will be diverted and used consumptively, and not for navigation. It is no answer to say that the water will be used for navigation first, and afterwards taken out and used consumptively. At least one-half of it is to be used in the Upper Basin, hundreds of miles above the site of the proposed dam and reservoir. By the Compact, which the Act approves, the Upper Basin is given the lion's share (five-sixths) of the apportioned water now remaining unappropriated. Whatever excuse or justification there may have been for thus favoring the Upper Basin, it cannot be pretended that improvement of navigation was thereby aimed at or accomplished.

Instead of being designed to improve navigation, the Compact was drawn with the unmistakable intention of dedicating the river to uses inconsistent with navigation. This is not a mere speculation, but appears from the express language of the Compact. Paragraph (a) of Article IV of the Compact provides (Bill, 54):

> "Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding."

The reason for this paragraph was stated by the then Secretary of Commerce, Honorable Herbert

Hoover, Federal representative on and Chairman of the Colorado River Commission, who said in his report transmitting the Compact to Congress (House Doc. 605, 67th Cong., 4th Sess., p. 4):

> "If navigation were to be considered as of paramount importance on this river, it would necessarily mean very serious interference with the agricultural and industrial development of the country tributary to it. Further dams across the stream must be constructed. Further water must be diverted, and a large quantity will be permanently lost to the volume of the river through evaporation, consumption, and diversion from the stream system. To render the river commercially navigable in fact requires a supply of water considerably greater in volume and more regular in flow than that now available. The basis for the recital in the compact that 'the reservation of its waters for navigation would seriously limit the development of its basin' is therefore apparent.
>
> "It is estimated by the Reclamation Service that some 4,000,000 acres of land at present arid, barren, unoccupied, and practically worthless can be irrigated from the waters of this river and made fertile and productive. Such development means population, prosperous homes, and thriving cities. There are power possibilities on the river involving the creation of millions of horsepower of hydro-electric energy with which to put into operation and maintain vast industries furnishing profitable employment. The possibilities of agricultural and industrial development are so great and their ramifications so far-reaching as to dwarf any values in the use of this river for navigation. Navigation and diversion for agriculture may not proceed economically together, for one necessarily impairs the other.

> These are the considerations which induce the declaration that the use of water 'for the purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes.'"

Congress accepted Mr. Hoover's views and consented to the Compact, including paragraph (a) of Article IV, without exception or reservation. To make this consent more emphatic and more effective, Congress went further and "enthroned" the Compact (including Paragraph (a) of Article IV), by providing in Section 8(a) of the Act (Bill, 70):

> "The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide."

Thus, by the terms of the Act itself, the recital therein that one of its purposes is the improvement of navigation must yield to and be controlled by the declaration in the Compact that "the Colorado River has ceased to be navigable for commerce," and that "the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes."

Arizona does not concur in the statement that the

Colorado River has "ceased" to be navigable. She alleges that it never was navigable. (Bill, 6, 7.) But even if its navigability were conceded, it would still be true that the Act, by accepting and approving this declaration in the Compact, shows on its face that improvement of navigation is not its purpose. Also, though navigability were conceded (as it is not), it would still be true, as shown above, that the effect of the Act is not to improve, but to destroy such navigability.

(*b*). *The Project.*

The project which the Act provides for is to consist of a dam, reservoir, power plant and incidental works and structures at Black Canyon and a main canal and appurtenant structures connecting Laguna Dam with the Imperial Valley in California. The project is to be constructed, maintained and operated by the Secretary of the Interior. (Bill, 58.)

By Sections 1, 6 and 8(a) of the Act, the construction, maintenance, operation and use of the project are made subject to the terms and provisions of the Colorado River Compact. (Bill, 58, 68, 70.) Since, in case of conflict, the provisions of the Act must yield to those of the Compact (Bill, 70), any use of the project which may be inconsistent with the Compact (though apparently authorized by the Act) is prohibited. Thus the primary use to which the project is to be put is the enforcement of a Compact which declares that "the Colorado River has ceased to be navigable for commerce," and that "the use of its waters for purposes of navigation shall be sub-

servient to the uses of such waters for domestic, agricultural, and power purposes".

Aside from its use in enforcing the Compact, the Act specifies, definitely and concretely, only two uses to which the project shall be put. One is the storage and sale of water. The other is the generation and sale of electric power. (Bill, 64-69.) Both uses would be hurtful rather than helpful to navigation, if there were any navigation to be hurt or helped.

It requires no argument to show that the navigation of a river, which (if it ever was navigable) has become non-navigable from lack of water, cannot be improved by taking more water out of it. Yet that is what this Act proposes to do. All contracts for the sale and delivery of water are required to be made subject to the Colorado River Compact (Bill, 70), which subordinates navigation to other uses of the river. (Bill, 54.) The Act places no limit on the quantity of water which the Secretary may divert and sell, nor does it restrict him as to the place of diversion or as to the place of consumption. Water sold by him may be diverted from the river at a point above the proposed dam, thus precluding any possible use of such water in navigation, and it may be transported any distance from the river, even to points beyond the Colorado River watershed.

Under color of the Act, defendant Wilbur has actually made a pretended contract whereby he undertakes to deliver to the Metropolitan Water District of Southern California 1,050,000 acre-feet annually of the water to be stored in the proposed reservoir. (Bill, 81.) This great quantity of water—more than one-eighth of the total unappropriated flow at Black Canyon—is to be delivered at a point immediately

below the dam or, at the option of the District, it may be diverted directly from the reservoir. (Bill, 81, 83.) In neither case could the water so diverted be used in navigation, even if the river were navigable. If it is diverted above the dam, the District must pay a higher price for it, not because of the loss to a non-existent navigation, but because of the loss which the power business will suffer thereby. (Bill, 83.) The District where this water is to be consumed is some 300 miles from the Colorado River and outside of its watershed. (Bill, 35.) The performance of this contract, if there were any navigation to be affected, would affect it adversely. The contract was obviously not intended to improve navigation, but was designed to accomplish a wholly different purpose, which defendant Wilbur himself has stated as follows (Cong. Rec., Feb. 3, 1931, vol. 74, p. 3995):

> "A river full of water will be taken 260 miles across the plains, lifted over a mountain range, and plunged down onto the coastal plain about Los Angeles to raise the water line still more and permit an otherwise impossible growth of population. An adequate supply will be made available to all the communities between Los Angeles and San Diego, sitting on the Mexican border, where millions may come to live with irrigated rose gardens about their homes and with irrigated trees dropping ripened fruit into their laps. * * *"

Even if the Colorado River were navigable, it could not be pretended that navigation thereof would be improved by the main canal and appurtenant structures connecting Laguna Dam with the Imperial Valley. That these works would impair rather than

improve navigation (if navigation existed) is self-evident. The whole purpose of the canal is to take water out of the river, and to take it out in greater quantities and at a point higher up the river than now. (Bill, 20.) This would necessarily diminish the navigable capacity of the river (if it had any) between Laguna Dam and the Gulf of California.

In this connection, it should be observed that the Act discriminates against Arizona and in favor of California, by providing this canal and the appurtenant structures, at a cost of $40,000,000, to facilitate the use of Colorado River water in California, while providing no similar facilities nor any facilities whatever for the benefit of Arizona water users, and by further providing that this water, which is to be stored in Arizona and made available by the use of Arizona's natural resources, shall be delivered without charge for use in the Imperial Valley, but that if used in Arizona, it must be bought and paid for. (Bill, 20.) And yet the use of water in Arizona would be less injurious to navigation (if any existed) than its use in California. Water used in Arizona may, and some of it will, find its way back into the river, but water used in the Imperial Valley, which is below sea level, can never be used again for any purpose. Therefore, if any thought of improving navigation had been in the mind of Congress, it would not have perpetrated this unconscionable and indefensible discrimination.

Even if the river were navigable, it could not be claimed that the generation or sale of electric power would of itself improve or tend to improve its navigability, nor could it be claimed that these activities are merely incidental to such improvement. The Act

under which the proposed power plant is to be constructed, maintained and operated is controlled by a Compact which declares that "the Colorado River has ceased to be navigable for commerce", and that "the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes" (Bill, 54.) That which is dominant cannot be merely incidental to that which is subservient.

Moreover, it appears from the documents discussed in the Appendix hereto (pp. 93-103), that even in the old days, when its normal flow (now reduced by one-half) had not been depleted, it was only in seasons of high water that the Colorado River ever approached a condition of navigability—a condition which, even then, it never quite attained. By storing the water and using it for the generation of electric power, as proposed in the Act, the flow of the river will be "equated", there will be no more seasons of high water, and all possibility of navigation will be automatically ended.

The pretense that this is a navigation act has no other basis than the recital in Section 1 that "improving navigation" is one of its purposes, and the recital in Section 6 that "improvement of navigation" is one of the uses to which the proposed dam and reservoir shall be put. (Bill, 58, 68.) As introduced, the bill (H. R. 5773) which is now the Boulder Canyon Project Act, did not contain the word "navigation". The words "improving navigation" and "improvement of navigation" were inserted as amendments, upon recommendation of the House Committee on Irrigation and Reclamation, after hearings, in the

course of which the constitutionality of the bill had been questioned. (House Report 918, 70th Cong., 1st Sess., p. 1.) No other reference to navigation was inserted or proposed. As to these amendments, Representative Leatherwood, of Utah, a member of the House Committee on Irrigation and Reclamation, justly observed in his minority report (House Report 918, 70th Cong., 1st Sess., Part 3, p. 14):

> "A new primary purpose of the project was put forward during the last meetings of the committee. This purpose is the improvement of navigation. I feel sure that the Congress is going to be most interested in this novel conception of the needs of navigation and the means of satisfying them. But for the authors of this bill, it would scarcely have occurred to many members that the Colorado River in its 500-mile course through the desert wastes of Arizona, Nevada, and California, from the Grand Canyon to the Gulf, was a locality where $100,000,000 should be spent in aid of navigation. It may occasion some surprise also that the Committee on Irrigation and Reclamation should for six years have retained jurisdiction over this important proposal for the improvement of navigation instead of relinquishing the control to the Rivers and Harbors Committee. But in extenuation of this conduct on the part of my committee, let me hasten to explain that it was not until the last week of these six long years of study and consideration of this navigation measure that the committee itself discovered that it was a bill for the improvement of navigation."

The truth is, of course, that these amendments were inserted as a belated afterthought, and in the mistaken belief that the word "navigation" possessed a magic

which would validate an otherwise unconstitutional measure. (*Child Labor Tax Case*, 259 U. S. 20, 38.) As introduced, as amended, and as finally passed, this was and is a navigation measure only in the sense that, if the Colorado River were navigable, its navigability would be destroyed by putting the Act into effect.

5. By This Act, Even Assuming the River to be Navigable, Congress Has Exceeded Its Powers and Has Invaded Rights Reserved to the State.

Regardless of the effect of the Act on navigation, defendant Wilbur and the States of California, Colorado, New Mexico, and Nevada insist that Arizona is not entitled to complain. (Wilbur Brief, 2, 18-26, 34-37; California Brief, 2, 4; Colorado Brief, 2, 10-15, 22-30.) Their contention seems to be that navigable rivers are subject to the control of Congress, not only for the purpose of regulating navigation, but for any other purpose which Congress may desire to accomplish; that a river once shown to be navigable is thereby withdrawn and removed from the jurisdiction and control of the State, not only for the purpose of regulating navigation, but for all purposes; that since the Colorado River is (as they say) a navigable river, the State of Arizona can have no rights in it; and that, therefore, regardless of what Congress has attempted to do with the river, the State cannot be heard to complain. The unsoundness of this contention is established by decisions of this Court forming an unbroken line from 1842 to the present day.

"* * * For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. * * *"

(By Chief Justice Taney in *Martin v. Waddell*, 16 Pet. 367, 410.)

"* * * To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. * * *

"By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case. * * *"

(By Mr. Justice McKinley in *Pollard v. Hagan*, 3 How. 212, 230.)

"* * * Settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original States were not

granted by the Constitution to the United States, but were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."

(By Mr. Justice Clifford in *Mumford v. Wardwell*, 6 Wall. 423, 436.)

"* * * Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such maner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government."

(By Mr. Justice Field in *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, 65)

"By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones."

(By Mr. Justice Swayne in *County of St. Clair v. Lovingston*, 23 Wall. 46, 68.)

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. * * * In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty."

(By Chief Justice Waite in *McCready v. Virginia*, 94 U. S. 391, 394.)

"* * * Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. * * * Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. * * *"

(By Mr. Justice Bradley in *Hardin v. Jordan*, 140 U. S. 371, 381.)

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. * * * Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory. * * *"

(By Mr. Justice Lamar in *Knight v. United States Land Ass'n*, 142 U. S. 161, 183.)

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters. * * *"

(By Mr. Justice Brewer in *Kansas v. Colorado*, 206 U. S. 46, 93.)

"* * * Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new State, upon its admission to the Union, becomes endowed with the

same rights and powers in this regard as the older ones. * * *"

(By Mr. Justice Van Devanter in *Scott v. Lattig*, 227 U. S. 229, 242.)

"The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same. * * * The character of the State's ownership in the land and in the waters is the full proprietary right. The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights. * * *"

(By Mr. Justice Brandeis in *Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 56, 63.)

"The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for the purposes of navigation.' * * * And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, * * * it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. * * *"

(By Mr. Justice Sanford in *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419.)

Applied to the Colorado River (and assuming it to be navigable) these decisions[1] establish the following propositions:

First. If and wherever navigable, the Colorado River belongs to and is owned by the State in which it is situated. The State in its sovereign capacity owns the water in the river, the bed of the river, and its banks to high water mark. This is a full proprietary ownership. It is subject to the power of Congress to regulate commerce by improving navigation. It is not subject to any other restriction or limitation. The State, being the owner, has the exclusive and unrestricted right to use and dispose of the water in the river and the land under it, to authorize the use thereof by others, and to regulate and control such use in whatever manner and to whatever extent it sees fit, subject only to the power of Congress in respect to navigation. The State's right of ownership and right to use and control the use of the river for all other purposes are reserved to it by the Constitution of the United States.

Second. Even assuming the Colorado River to be

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[1] See also *Goodtitle v. Kibbe*, 9 How. 471, 477; *Doe v. Beebe*, 13 How. 25, 26; *Den v. Jersey Co.*, 15 How. 426, 432; *Smith v. Maryland*, 18 How. 71, 74; *Gilman v. Philadelphia*, 3 Wall. 713, 726; *Barney v. Keokuk*, 94 U. S. 324, 338; *Packer v. Bird*, 137 U. S. 661, 666; *Manchester v. Massachusetts*, 139 U. S. 240, 260; *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U. S. 254, 273; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 435; *Shively v. Bowlby*, 152 U. S. 1, 26, 58; *Eldridge v. Trezevant*, 160 U. S. 452, 468; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 359; *Green Bay & Miss. Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 77; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703; *Illinois Central R. R. Co. v. Chicago*, 176 U. S. 646, 659; *Mobile Transportation Co. v. Mobile*, 187 U. S. 479, 482; *United States v. Mission Rock Co.*, 189 U. S. 391, 404; *Hardin v. Shedd*, 190 U. S. 508, 519; *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 451; *McGilvra v. Ross*, 215 U. S. 70, 79; *The Abby Dodge*, 223 U. S. 166, 174; *Oklahoma v. Texas*, 258 U. S. 574, 583; *Appleby v. New York*, 271 U. S. 364, 381.

navigable, the United States does not own it, and has no right to use it or control it for any purpose, except that of regulating commerce by improving navigation. Not being the owner, the United States cannot, for any purpose or upon any pretext, sell or dispose of the water in the river or the land under it. The power to direct or authorize any such use, control, sale or disposal of the water in or the land under the river has not been delegated to Congress by the Constitution of the United States.

The fact that other States have rights in the Colorado River adds nothing to the powers of Congress. Where the river forms the boundary between Arizona and another State, each owns to the middle of the stream. (*Supra*, 3.) If they disagree about the division or use of boundary waters, their dispute, like any other interstate boundary dispute, can be settled by a decree of this Court. Congress is powerless to settle it or to make any division or apportionment of such waters. *Louisiana v. Mississippi*, 202 U. S. 1, 40; *Washington v. Oregon*, 211 U. S. 127, 131; *New Mexico v. Colorado*, 267 U. S. 30, 41. The same is true of a controversy between an upper and a lower state. *Kansas v. Colorado*, 185 U. S. 125, 145; S. C. 206 U. S. 46, 98; *Wyoming v. Colorado*, 259 U. S. 419, 465.

The result, therefore, of assuming the Colorado River to be navigable is to establish even more firmly Arizona's right to appropriate and use its waters and to regulate and control their appropriation and use by others. That this right is invaded and threatened with destruction by the Boulder Canyon Project Act has been abundantly shown. It has also been shown that improvement of navigation—the only ground

upon which Federal interference with State control of navigable waters can ever be justified—is not the purpose or effect of the Act. It necessarily follows that, in passing this Act, Congress has exceeded the powers delegated to it by the Constitution.

IV.

THE BOULDER CANYON PROJECT ACT, NOT BEING AN EXERCISE OF POWER GRANTED BY THE COMMERCE CLAUSE, CANNOT BE SUSTAINED UNDER ANY OTHER PROVISION OF THE CONSTITUTION.

Defendant Wilbur contends that, regardless of the power of Congress under the commerce clause, the Act is constitutional. He urges three grounds for sustaining it, reclamation of public land, prevention of floods, and the general welfare. In none of these can a constitutional basis for this Act be found.

1. The Act Cannot Be Sustained as a Regulation Respecting Property of the United States Under Article IV, Section 3, Clause 2, of the Constitution.

(a). *It is Not Pretended, and Cannot Be, That This Act Provides for the Reclamation of Any Public Land.*

There is nothing in the Act or in the pleadings to indicate that there is an acre of land belonging to the United States which can be irrigated by water from the proposed reservoir. But even more important, the Act does not provide for the irrigation of any public land, if any exists.

The only mention of reclamation of public land contained in the entire Act, beyond the recital of purposes in Section 1, is in Section 9. This section relates solely to such public lands in California as may be found by the Secretary to be practicable of irrigation from the All-American Canal, and merely provides that they be withdrawn from entry and reopened in small plots, and that if and when taken up, entrymen shall pay an equitable share of the construction cost of the canal and appurtenant structures. Since the route of the canal is not determined by the Act, and has not yet been determined, it can hardly be claimed that this section provides for the reclamation of public land. Section 9 is obviously inserted to enable the Secretary to prevent speculation in public land, if any exists, along any of the possible routes of the All-American Canal.

Furthermore, the works authorized in this Act will not irrigate any public land in the Imperial or Coachella Valleys, if any such land exists. The authorization of $165,000,000 for the construction of works provided for in the Act was made upon the report of the Colorado River Board created by the Joint Resolution approved May 29, 1928. (45 Stat. 1011.) The canal, the cost of which was included within the amount of $165,000,000, was stated by the Board to be only a canal reaching the distribution system of the Imperial Valley. To include any other land not reached by that system would require additional construction costing $11,000,000. (House Doc. 446, 70th Cong., 2d Sess., p. 7.) This was not authorized by the Boulder Canyon Project Act. All land irrigated by the Imperial Valley distributing system is said by Senate Document 142, 67th Cong., 2d Sess., p. 74, cited by the Wilbur brief, p. 34, to be privately owned.

So far as public land elsewhere located is concerned, it is enough to point out that, under the Reclamation Law, no reclamation project may be instituted until the Secretary has made findings in writing regarding cost, feasibility and probability of return of cost to the United States; until the President has approved the project; and until Congress has made the necessary appropriation. U. S. C. Title 43, Sec. 412, 413, 414. None of these steps has been taken to ascertain the possibility of or to institute any such irrigation projects.

Neither the House nor the Senate Committee reporting this bill contended in stating the purposes of the project that the effect of this Act would be to irrigate any public land whatever. The statements regarding irrigation are substantially the same. We quote from the House report (House Report 918, 70th Cong., 1st Sess., p. 6):

> "Second. It will end an intolerable situation which now exists in Imperial Valley. This Valley now secures its sole water supply by a canal which runs for some 60 miles through Mexico. The All-American Canal will furnish a substitute for this and at the same time carry the water at an elevation sufficient *to make possible, at some future date,* the irrigation of additional land, mostly public, lying about the rim of the cultivated area." (Italics ours.)

Thus the contention is not and cannot be that *this Act* provides for the reclamation of any public land, but merely that the works authorized by this Act for other purposes may "at some future date" be availed of, in the discretion of Congress, to reclaim public land,— in other words, that while no present reclamation is provided for, one purpose is future

reclamation. But the Act will not warrant even this attenuated claim of purpose. Regarded as a provision for future reclamation of public land, it is fantastic.

First: All uses of water in California, on public as well as on private lands, are limited both by the Compact (Act, Sec. 8(a)) and by agreement with California (Act, Sec. 4(a)). The apportioned waters will be exhausted by the 6,500,000 acre-feet of present uses plus the 1,050,000 acre-feet to be delivered under the Metropolitan Water District contract, leaving only half of the surplus waters available. Private users will be entitled to contract for this water, subject to the Mexican burden and future reapportionment, with the result that when the "future date" arrives for the reclamation of public land, if any, the limit will have been reached. Certainly every inducement is offered private owners to exhaust the limit before public reclamation projects can do so.

Second: In Arizona all water used, whether on public or private land, is made subject to the future claims of the Upper Basin to the extent of its apportionment. It is hardly possible that Congress intends to institute costly reclamation projects to use this water, when it expressly recognizes the prior rights of the Upper Basin States to it. Certainly the Upper Basin representatives in Congress would not approve such action. It would be hard to imagine a course more fruitful of controversy than this. As to surplus water, this is subject to variations in river flow, to the Mexican burden and future reapportionment—hardly the most ideal water with which to irrigate public land for entry and purchase by settlers.

It is not necessary to go into further detail.

Enough has been said to indicate that as a provision for the future reclamation of public land, no more mad or irrational system could be devised. Almost every conceivable obstacle is placed in the way of future public reclamation projects in the Lower Basin.

The truth of the matter is, of course, that reclamation of public land has no part whatever in the purposes of this Act. It is a mere pretense to cloak the exercise of powers not delegated to Congress but reserved to the States.

(*b*). *This Act Goes Far Beyond the Power of Congress Over the Public Land.*

The power of Congress to make regulations concerning the reclamation of land of the United States does not include the power to override State laws in respect to the general subject of reclamation, as this Act attempts to do. In *Kansas v. Colorado*, 206 U. S. 46, 92, this Court, speaking through Mr. Justice Brewer, said:

> " * * * As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite

grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation. * * *"

Ever since the Reclamation Act of 1902, Congress has recognized this and specifically provided that the projects shall be carried out in conformity with state law.[1] We have already pointed out not only that this project is to be carried out in defiance of Arizona law, but that the very purpose of the Act is to override the laws of Arizona in respect of the use of Colorado River water, and to enforce in that State the provisions of the Colorado River Compact, which Arizona has rejected. This, and not reclamation, is one of the purposes of the present Act. Reclamation can be, and has been for thirty years, accomplished under the Reclamation Act. No legislation is needed for that purpose. But the imposition of the Compact upon Arizona cannot be accomplished under the Reclamation Act, and so this statute is enacted to do it. The very Act provides (Sec. 4(a)) that it shall not take effect until the Compact, which it approves (Sec. 13), is ratified without Arizona's consent, and that every use made of river water or of the dam, and even the laws of the State, shall be subject to the Compact. (Sec.

[1] "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." (U. S. C. Title 43, Sec. 383, June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

4(b), 5, 6, 8, 13, 18, 19.) Enforcement of the Compact is the heart of the Act.

Whatever else may be said about such a purpose it is patently extraneous to the reclamation of public land, and an attempt to exercise powers reserved to the States.

There is a suggestion in the Wilbur brief that some provisions of the Arizona Enabling Act, Sections 20 and 28, support this asserted power. Section 28 is clearly irrelevant. This provides the manner in which land granted to the State by the United States may be sold, and that within five years the Secretary of the Interior may exchange other lands for granted lands which may contain power sites. Section 20 provides that an irrevocable ordinance shall be passed, containing among other provisions, and in addition to the usual disclaimer of title to the ungranted public land, the following:

> "Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled 'An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory."

This last provision was inserted in the Arizona Constitution, Article XX, Paragraph Tenth, and subsequently stricken therefrom by amendment effective June 27, 1927. (Session Laws of Arizona, 1927, pp. 557-561.) The attempt made by this section of the

Enabling Act to deny to Arizona admission to the Union upon an equal footing with the other States was beyond the power of Congress and ineffective. This principle is too well settled by decisions of this Court to require further discussion. *Coyle v. Smith*, 221 U. S. 559; *Bolln v. Nebraska*, 176 U. S. 83; *Ward v. Race Horse*, 163 U. S. 504; *Van Brocklin v. Tennessee*, 117 U. S. 151, 164-165, 167; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688; *Pollard v. Hagan*, 3 How. 212, 223. Compare *Kansas v. Colorado*, 206 U. S. 46, 88-93.

Nor do the cases cited on page 23 of the Wilbur brief (see, *infra*) in any way support the present statute. These cases merely announce the unquestioned rule that under Article IV, sec. 3, cl. 2, of the Constitution, Congress has power to protect the public land, control its use and prescribe in what manner others may acquire rights therein, and that the States may not interfere with the exercise of this power. Arizona does not seek in any way to interfere with the accomplishment of any of these purposes. It has not changed its laws as to streams in any respect (compare *Boquillas Land and Cattle Co. v. Curtis*, 213 U. S. 339) and so has not overstepped any rule laid down in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703. It has not attempted to divert water the undiminished flow of which was granted by treaty, as in *Winters v. United States*, 207 U. S. 564; nor taxed public lands (*Stearns v. Minnesota*, 179 U. S. 223, 245); nor attempted to permit trespasses on public lands (*Utah Power & Light Co. v. United States*, 243 U. S. 389, 403-404); nor denied the validity of any rights granted by the United States while Arizona was a territory (*United States v. Holt State Bank*, 270

U. S. 49, 54-55); nor interfered with the protection of the public land from injury (*Hunt v. United States*, 278 U. S. 96, 100).

The present case does not involve in any manner the power of Congress to reclaim public land. It raises no question whether or not the long accepted practice of requiring such projects to be carried out in conformity with State law is necessitated by the Constitution. It does raise the legality of acts in no way connected with the reclamation of public land, the purpose and effect of which is to invade the *quasi*-sovereign rights of the State in the waters within its boundaries.

2. The Act is Not an Exercise of Any Other Power Delegated to Congress.

The Constitution does not grant to Congress any power to control floods as such, popular superstition to the contrary notwithstanding. Congress, in the exercise of its power to control and improve navigation in interstate or foreign commerce, conferred by the commerce clause, may and has undertaken works to control floods which menace that navigation. But the power is to improve and protect the navigation. *Bedford v. United States*, 192 U. S. 217, 223; *Jackson v. United States*, 230 U. S. 1, 23; *Hughes v. United States*, 230 U. S. 24, 33; *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 369.

We have already shown that the Colorado is not a navigable river; that the purpose of this Act is not to improve navigation, but to destroy any possibility of it; and that the Act cannot be sustained under the commerce clause.

But it is contended (Wilbur Brief, 23) that the

purpose is to control floods for the purpose of protecting government property. There is nothing whatever before the Court to suggest that any property of the United States is menaced by floods on the Colorado, or that Congress believed such to be the case. Appendix B of the Wilbur brief (pp. 47-59), entitled "Flood Control", contains a report of the Director of the Reclamation Service and the reports of the House and Senate Committees on this bill relating to flood control. There is not a word in any of these documents even to intimate that property of the United States is menaced by floods, or that this Act is intended to or will have the effect of protecting any such property.

The Wilbur brief is then thrown back on the general welfare argument. It says (pp. 36-37):

> "Even where Congress has no power to enact regulatory legislation as to a subject matter, it may make appropriations for the public welfare. * * * Even if the dam were to be erected solely in order to save the Imperial Valley from destruction, the Boulder Canyon Project Act would be constitutional."

Obviously the practice of Congress in making appropriations which require no act to be done in any State without its consent, and which are not questioned by any person with sufficient interest to maintain a suit (compare *Massachusetts v. Mellon*, 262 U. S. 447), has no bearing upon the present case. This is not such an act. Here defendant Wilbur is authorized to do acts in Arizona which violate its laws, and which the State resists. He is authorized to seize and regulate the use of natural resources of the State in such a way as to deny all beneficial use of them to Arizona and its people. No matter how worthy

the motives of Congress may be, or how beneficial to the Imperial Valley, Congress has no such power under the Constitution.

Furthermore, the dam is not erected solely to save the Imperial Valley. Arizona has no desire to injure the Imperial Valley or deny it protection. It is well known that there is no danger of its "destruction",[1] but such danger as there is, Arizona is quite willing to cooperate in averting. It is not now faced with any such question, but with an attempt, initiated by California, to have defendant Wilbur erect structures in Arizona and divert water from Arizona, first to generate power for California, second to irrigate private lands in California, and third to furnish a municipal water supply for Southern California cities;[2] and, in order to obtain the acquiescence of the Upper Basin States, to prevent Arizona and its people making appropriation of any of the unappropriated flow of the river within the borders of Arizona. It is difficult to believe that the attempted justification of

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[1] "* * * In the interest of truth, however, it must be stated that the flood of 1905 flowed through the banks of the Colorado at a point on the river where the farmers of the Imperial Valley had themselves made the break in the banks. (S. Doc. 142, 67th Cong., 2d Sess.) It must also be made clear that the total value of property destroyed during and as a result of that flood did not exceed $5,000,000 in spite of the fact that for over 18 months practically the entire flow of the Colorado ran through the Imperial Valley and into the Salton Sea. It must also be stated that during that entire period only 8 lives were lost, 6 of which were those of men who, while in line of duty, fell off the break in the levees on which they were working and 2 of whom were drowned while attempting to cross the river on a temporary cableway. This is a true picture and a true statement of what actually occurred in the great flood of 1905. (Reference H. R. 5773 hearings, pt. 3, p. 433.)" (House Report 918, 70th Cong., 1st Sess., part 2, p. 5.)

[2] In a joint letter dated March 24, 1924, from Secretaries Work, Wallace and Weeks (constituting the Federal Power Commission) to the Chairman of the House Committee on Irrigation and Reclamation, relative to this project, the Secretaries said (Hearings on H. R. 2903, 68th Cong., 1st Sess., Part 5, p. 1000):

"Flood control and irrigation storage are presumed to be the primary purposes for which it is proposed to construct the dam at

such an invasion of the *quasi*-sovereign rights of the State, upon the ground that the Act is a mere appropriation for the public welfare, can be seriously made.

It is also immaterial that prior to the passage of this Act California and its people might lawfully appropriate unappropriated Colorado River water flowing within the boundaries of that State. (Wilbur Brief, 35.) Neither California nor its people may, against the wishes of Arizona, invade its territory to construct works there and divert and consume water from Arizona. Furthermore, the Act does not merely make possible the appropriation of water in California. It attempts to authorize an officer of the United States to seize and assume control of all un-

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Boulder Canyon. While there are differences of opinion with respect to the amount of storage actually required for these purposes, it is agreed that 8,000,000 acre-feet is the maximum required, and it is probable that 4,000,000 feet would be reasonably adequate. The nearer the reservoir is installed to the lands to be protected or irrigated, the more satisfactorily will it serve the purposes of flood control and irrigation. Information recently made available indicates that a reservoir of sufficient capacity to serve all the needs of flood control and irrigation could be located on the river some 100 miles nearer the lands to be served and at a cost of not more than one-half that of the proposed high dam of Boulder Canyon. If this is correct, the location of the dam at Boulder Canyon and its construction to the height proposed must be justified, if at all, wholly from the standpoint of the development of electric power.

* * * * * * * * * *

"In so far, at least, as the project exceeds the requirements of flood control and irrigation, the bill proposes that the United States undertake a new national activity, namely, the business of constructing facilities for production of electric power for general disposition, an activity which, if logically pursued, has possibilities of demands upon the Federal Treasury in amounts far beyond those now involved in reclamation and highway construction combined. While the United States has heretofore constructed power developments in connection with irrigation projects, these developments have been merely incidental to the projects, have been of a few thousand horsepower only, and have been primarily for use on the projects themselves. The construction of a reservoir having a capacity of from four to eight times the needs of irrigation and flood control and of a power development twenty times in excess of the probable power needs of the irrigated lands and adjacent communities is a complete departure from former policies. * * *"

appropriated water in the Colorado and, thereafter, in his discretion to dispose of such water by contract, and to prevent any use thereof except by such contracts. These contracts deny the right to appropriate water, and attempt to substitute therefor rights of use, subject to subsequent defeasance, as provided in the Colorado River Compact. This statute cannot be justified as authorizing any act which California might herself undertake.

CONCLUSION.

The bill is not vulnerable to any of the objections made in the motions to dismiss. This is not, in form or in substance, a suit against the United States. The bill presents a justiciable controversy within the jurisdiction of this Court. The rights asserted and sought to be protected are not political or abstract, but are *quasi*-sovereign and property rights of the State of Arizona, which defendants are now injuring and threatening to injure and destroy, and which this Court's equity powers are competent to protect. The Act under color of which these injuries are being committed and threatened cannot be justified under the commerce clause or any other clause of the Constitution. The motions to dismiss should, therefore, be denied.

Respectfully submitted,

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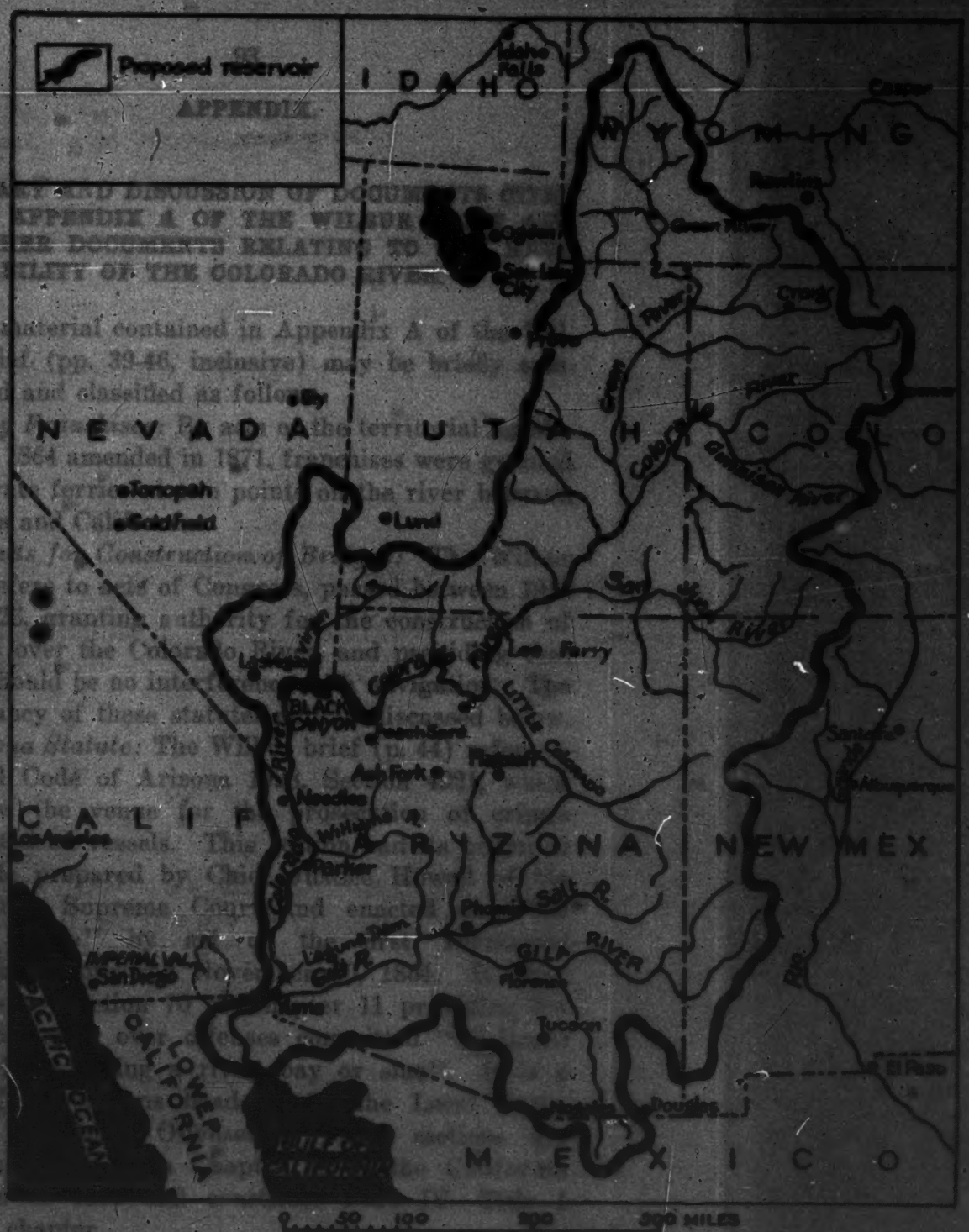

MAP OF COLORADO RIVER DRAINAGE BASIN

APPENDIX.

SUMMARY AND DISCUSSION OF DOCUMENTS CITED IN APPENDIX A OF THE WILBUR BRIEF AND OTHER DOCUMENTS RELATING TO THE NAVIGABILITY OF THE COLORADO RIVER.

The material contained in Appendix A of the Wilbur brief (pp. 39-46, inclusive) may be briefly summarized and classified as follows:

Ferry Franchises: By acts of the territorial legislature in 1864 amended in 1871, franchises were granted to operate ferries at two points on the river between Arizona and California.

Permits for Construction of Bridges: The Wilbur brief refers to acts of Congress, passed between 1913 and 1926, granting authority for the construction of bridges over the Colorado River, and providing that there should be no interference with navigation. The irrelevancy of these statutes will be discussed below.

Arizona Statute: The Wilbur brief (p. 44) refers to Revised Code of Arizona 1928, Section 4921, which provides the venue for the prosecution of crimes committed on vessels. This section had its origin in the code prepared by Chief Justice Howell of the Territorial Supreme Court and enacted as "The Howell Code" by act of the first Territorial Legislature approved November 10, 1864. It there appears as Section 70 of Chapter 11 providing for the jurisdiction over offenses committed "on board a vessel navigating a river, bay or slue". It is a part of 12 sections headed "Of the Local Jurisdiction of Public Offenses." These sections are taken verbatim from Chapter 29 of the California Statutes of 1851 and constitute Part IV—Title I of that chapter.

Territorial Legislative Memorials: In 1864, 1865, 1883, 1884, 1885, 1889, the Territorial Legislature memorialized Congress to appropriate from $100,000 to $150,000 to make the river above Yuma "permanently navigable." (Acts of 1883, pp. 301-2.) Claims are made that the river is navigable "in high stages of water" (Acts of 1865, p. 77), but that it is difficult and dangerous. (Id.) Congress appropriated $25,000 in 1884. No further appropriations were made. In 1909 there was a request for appropriation to dredge the channel below Yuma. No appropriation was made. In 1909 the river changed its course in Mexico as is pointed out below.

In 1866 a resolution was passed (Acts of 1866, p. 61) expressing the gratitude of the legislature to "Admiral" Rogers, Commander of the "Esmeralda", who by "indomitable energy" had taken that flat-bottomed stern wheeler up the river as far as Callville. The memorial of November 5, 1866 (Acts of 1866, pp. 67-68), was one protesting against the inclusion in Nevada of the territory now forming the southern part of that State below the 37th parallel, and making a glowing picture of the future of that area if added to Arizona.

The memorials of 1903 and 1909 (Wilbur Brief, 41, 43) urged appropriations for the construction of a levee and bridge, respectively. The alleged navigable character of the river was given as a reason for Congressional generosity. The appropriations were not made.

Reports of Territorial Governors: The requests for appropriations from Congress were taken up by Governor Hughes in his reports of 1893-1895. Claims were made of great navigable distances which would result from these expenditures. No appropriations

resulted, possibly because the fears of Captain Mellon, quoted in the report of 1894 (p. 58), were realized. He said:

> "Having associated with the U. S. engineers for a period of two years, while they were at work on the river, (this refers to work done under the appropriation of 1884) and knowing in consequence their disposition, I am quite sure that they will not recommend any work being done on this river, as the surroundings are too lonesome for them, but should an appropriation be made for this purpose they would expend it judiciously."

The later reports of Governor Murphy, referred to, abandon the request for appropriations. They repeat the old claims of navigability and hope for a return "of the old steamboating days."

Congressional and Executive Reports upon the Present Statute: These reports are referred to on pages 45 and 46 of the Wilbur brief. The first report, that of the Director of the Reclamation Service, made in February, 1922, claims, among reasons given why the development of the Colorado River is a national problem, that it is a navigable river. This assertion is made on page 1 of the report. The report with its appendices contains 233 pages. There is not another reference to the alleged navigability of the river in the entire report, nor is any fact stated which would tend to support this claim. The report of the House Committee, next referred to, states that evidence has been presented to it "which would tend toward the conclusion that the river is navigable as a matter of law." This cautious statement is not supported by any reference to the alleged evidence on which it is based. The Senate Committee report

states frankly that in its natural state the river is not susceptible for use as a highway of commerce.

Historical Works of Reference: These volumes begin with the early efforts in the '50s, '60s and '70s of the last century, before the railroads were extended to California and when overland travel by stage through desert and Indian inhabited country was difficult and dangerous, to provide transportation to and from Arizona. The first plan was devised in 1855 by Secretary of War Jefferson Davis who imported a herd of camels from Africa. This attempt to bring the East and the West together proved a failure. Supplies were then shipped by boat from San Francisco to the mouth of the Colorado, where they were unloaded. The treaties of 1848 and 1853 with Mexico did not permit overland travel between Arizona and the Gulf of California, but required that it be by river. Accordingly flat-bottomed stern wheel steamers, with great difficulty, during most of the year from low water and sand bars and during a few months from high water and driftwood, carried freight to Yuma, 96 miles from the Gulf. Under favorable conditions trips were made above Yuma, some of considerable distance, which were regarded as so extraordinary that the "indomitable energy" of those who accomplished them was the subject of legislative resolutions of commendation. When railroad communication with California was possible the unequal struggle to navigate the Colorado was soon abandoned. In 1909 the river changed its course in Mexico moving twenty miles to the west and flowing through Volcano Lake. It is described by the International Water Commission as follows:[1]

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[1] Report of American Section of International Water Commission, United States and Mexico (1930), House Doc. 359, 71st Cong., 2d Sess., page 20.

"When the Commission inspected this portion of the river's course in the spring of 1928 there was no one channel in existence and the river resembled a network of streams hardly, in most cases, large enough to deserve the ordinary appellation of creek. They were really a series of brooks. * * *"

The historical and scientific material bearing on the navigation of the Colorado is well summed up by Dr. Elwood Mead in the report of July, 1919, of the All-American Canal Board to the Secretary of the Interior (pp. 13-14):

"Until the Colorado River made its change of alignment in 1909 the navigation of the river by very light-draft boats was possible from the gulf to and beyond Yuma. The river had, however, lost importance as a navigable waterway when the railroads were built which cross the stream at Yuma and at Needles. Navigation at its best was carried on under difficulties. The river flows in a broad bed with a bottom of fine sand. The width of the stream between banks in straight reaches is generally 600 to 900 feet. In bends and where there is much bank cutting the width is occasionally half a mile or more. At low water there was scant depth and at high water the swift current and large amount of drift added to the difficulties of navigation. At present the ascent of the river by boat from the Gulf of California is understood to be not practical at any stage of the river, owing to the fact that there is no continuous main channel through the Volcano Lake region, where the river spreads its water over a broad area. * * * The construction of the Laguna Dam, authorized by an act of Congress in 1904 which gave the Secretary of the Interior the right to divert water from the river for the Yuma

project, has interposed a barrier to navigation about 12 miles above Yuma and may be accepted as an indication that the United States regards the navigability of the Colorado River as of no importance. The utilization of the river's waters for irrigation far outweighs any possible utilization thereof for navigation. The most recent examination of the Colorado River, with a view to developing and improving navigation was made by Maj. R. R. Raymond, of the Corps of Engineers, United States Army. His report bears date of May 21, 1914, and has been published as House Document No. 1141 of the Sixty-third Congress, second session. Maj. Raymond, in this report, after referring to the fact that the navigability of the Colorado River has been the subject of preliminary examination several times, states that with the information contained in the reports which he enumerates and that found in other records it was not necessary to make an extensive reconnaissance of the river. He visited the river, however and says:

"'Below Yuma the river flows through a delta country which is constantly being built up by the large quantity of silt carried by the river. The channel is unstable and can not be made stable at reasonable cost. At present the principle channel in Mexico passes through Volcano Lake. In addition to the fact that this part of the river lies in a foreign country, it should be noted that there is so little water available in the river below the heading of the Imperial Canal during low stages that navigation throughout the year is impracticable. The amount of water extracted from the river for irrigation will increase rather than decrease.'

"After referring to the fact that the growth of commerce along the river would imply an increase of the demand for irrigation waters, Maj. Raymond concludes that—'the improvement of

the Colorado River for navigation would defeat its own ends and would be a detriment to the adjacent country, except possibly that flood control would be beneficial.'

"He finds the situation such that he does not even recommend a survey of the river, and says:

"'Attention is invited to the conclusion reached by officers who have examined this river heretofore, which agrees with my own. The development of the country by irrigation in recent years makes the improvement even less desirable today than it was formerly.'"

And in "Mormon Settlement in Arizona", (1921), cited by the Wilbur brief, the author says (p. 112):

"The Colorado now absolutely has lost all possibilities for commerce. Pioneer conditions are about the same as far southward as the Laguna dam. This structure, built to divert water for the Yuma and Imperial valleys, absolutely bars the river channel for navigation. Above it and below it now are only ferries and a few power boats. The great Imperial canal system, at a point below Yuma, for much of the year drains the river flow. Where good-sized steamers once plied from tidewater, at the head of the Gulf of California, now, for months at a time, is only a dry sand wash. To this extent the advance of civilization has obliterated a river that ranks, in geography at least, among the greatest streams of the United States."

Mr. Herbert Hoover, in making his report to Congress upon the Colorado River Compact, said (67th Cong., 4th Sess., House Doc. 605, pp. 3-4):

"* * * While there is an occasional period of high water when navigation may be physically possible, this would continue for only a few months in ordinary years. There is no commercial navigation upon the river at present."

In *Oklahoma v. Texas*, 258 U. S. 574, this Court held insufficient to warrant a finding of navigability evidence which is strikingly parallel to that just mentioned. In that case the Court was concerned with the Red River on the boundary between Oklahoma and Texas. The very names of the rivers indicate elements of similarity. We are here concerned with the Colorado (Reddish) River of the West. In that case, as in this, permission had been asked of Congress, and granted by it, to construct bridges over the river. These requests for authority indicated, as this Court said (p. 586), mere prudence on the part of those constructing the bridges, and the qualification attached to the grant of authority was "only precautionary and not intended as an affirmation of navigable capacity." In that case Congress had expended $500,000 to improve the river, and had then abandoned the attempt, upon the recommendation of Army engineers that it was not likely to result in any commercial navigation and that the small (high-water) commerce of an earlier period had disappeared (p. 590). In this case it appears that 47 years ago Congress authorized an expenditure of $25,000, and then abandoned the attempt to make the river navigable upon the similar recommendations of Army engineers.

In that case the Court was given statements found in early publications and repeated in later ones to the effect that the river was navigable for great dis-

tances.[1] The Court referred to these publications in language pertinent to similar publications referred to in Appendix A and already summarized. It said (p. 586):

> "* * * These statements originated at a time when there were no reliable data on the subject, and were subsequently accepted and repeated without much concern for their accuracy. Of course, they and their repetition must yield to the actual situation as learned in recent years. The evidence also discloses an occasional tendency to emphasize the exceptional conditions in times of temporary high water and to disregard the ordinary conditions prevailing throughout the greater part of the year. * * *"

In that case the date and history of the early navigation relied upon in the area under consideration by the Court was substantially identical with the early navigation shown by Appendix A upon the entire Colorado. The Court summarizes it on page 589:

> "Lanesport, Arkansas, which is near the Oklahoma boundary, has been the usual head of navigation; but for several years before railroads were extended into that section boats of light draft carried merchandise up the river to

[1] In this connection it is interesting to note that the Wilbur brief on page 44 refers to the New International Encyclopedia as an authority for the navigability of the Colorado River. This work of reference is also an authority for the navigability of the Red River in the area in which this court held that it was not navigable. After stating that the Red River has a length of 1045 miles the Encyclopedia in Vol. 19, page 622, says:

> "It has a navigable length of about 1250 miles, and its tributaries, chief of which is the Washita, afford in addition 2100 miles of navigable waterways. * * *"

The Encyclopedia Britannica makes no statement that the Colorado River is or ever was navigable. See Vol. 6, pp. 49, 50.

> the mouth of the Kiamitia (83 miles up stream from the eastern boundary of Oklahoma) and other points in that vicinity and took out cotton and other products on the return trip. This occurred only in periods of high water, and was accomplished under difficulties. In very exceptional instances boats went to the mouth of the Washita, (217 miles up stream from the eastern boundary of Oklahoma) where some had to await the high water of the next season before they could return. When the railroads were constructed this high-water or flood navigation ceased. That was between 1875 and 1880."

In this case, before the railroads were extended to California, navigation under great difficulties is shown to have taken place 96 miles up the Colorado from the Gulf of Mexico, and under exceptional circumstances for some distances further. When railroads were built this navigation, like Jefferson Davis' camels, became a tradition.

In that case the Court found (p. 590) from witnesses who had had long knowledge of the river that,

> "the depth of the water at ordinary stages has come to be less than it was from 1850 to 1870, when they first knew it. Portions of the banks have been swept away and sand in great quantities has been brought down stream, making the river wider and shallower than at the time of the navigation just mentioned."

In the present case it is shown that, since the time when the river was navigated, one-half of the water then flowing in it has been diverted and is consumed in irrigation.

The physical condition of the two rivers is so strik-

ingly similar that the Court's description of the Red River could stand without change as a description of the Colorado. Both rivers flow through country where the rain fall is light and is confined to a relatively short period of the year, so that neither has a dependable body of water. (p. 587) Both have a fall of from one to three feet per mile. (pp. 587, 589) The Red River has a width in places of 1,000 feet (p. 588); the width of the Colorado varies from 600 to 900 feet. The bed of the Red River "consists of light sand which is easily washed about and is carried down stream in great quantities at every rise of the water." (p. 589) The Colorado River "flows in a broad bed with a bottom of fine sand." The Red River is shallow, from 18 inches to 3 feet deep, is blocked by shifting and extensive sand bars, and its channel shifts from one side of the river bed to the other. (pp. 587-589) In the Colorado, "at low water there is scant depth"; it, too, is obstructed by numerous sand bars (Bill, 7); and its "channel is not stable and can not be made stable at reasonable cost."

Summing up all the evidence, the Court said of the Red River what, if the material contained in Appendix A of the Wilbur brief were before it, it must say of the Colorado (p. 591):

> "* * * it is neither used, nor susceptible of being used, in its natural and ordinary condition as a highway for commerce. Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability."